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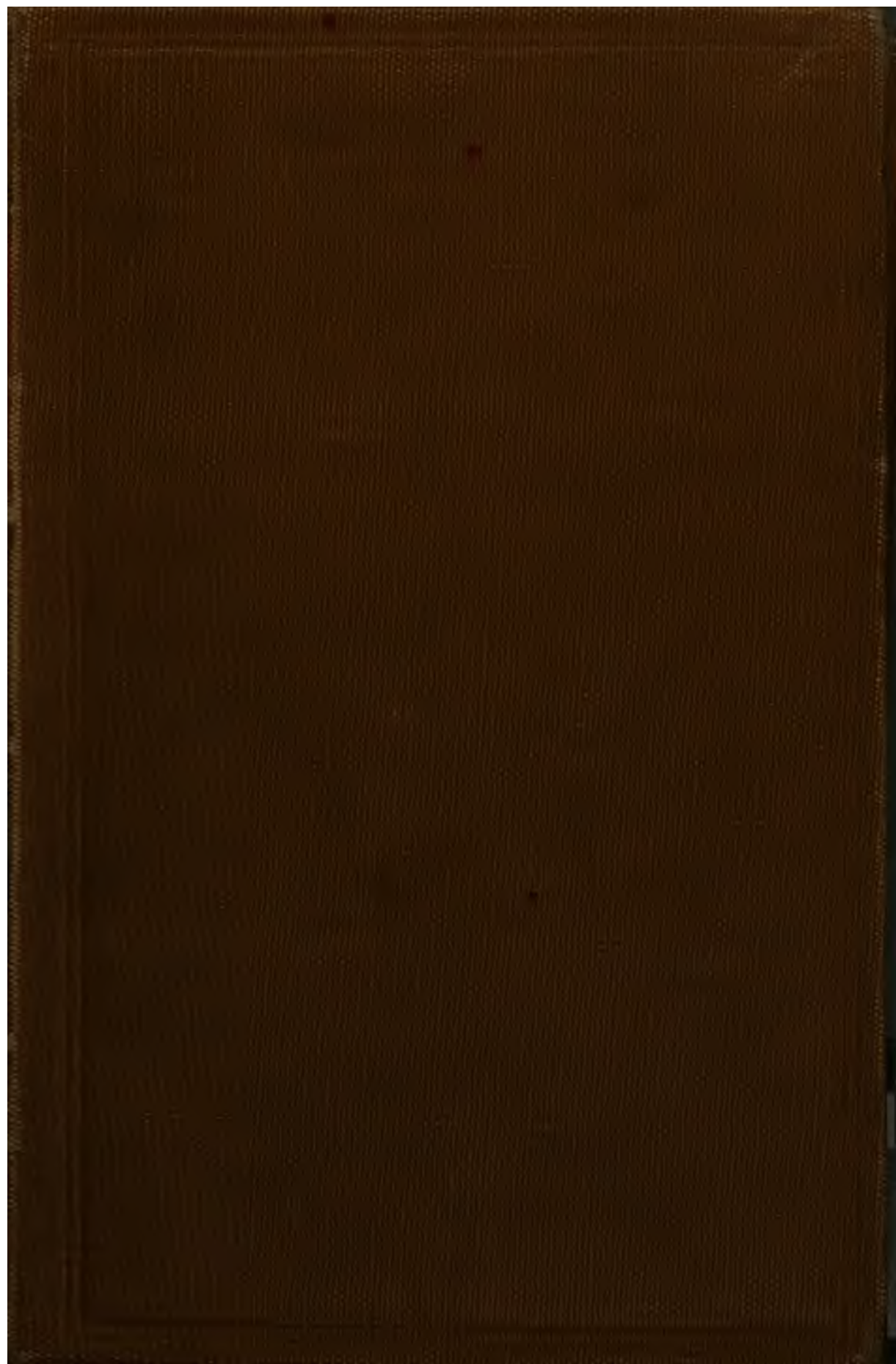
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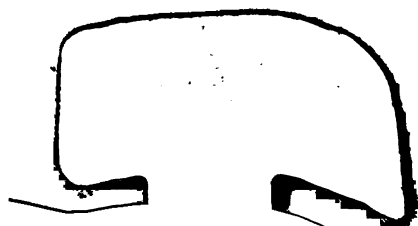
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# LAW OF WILLS AND ADMINISTRATION

BY  
JAMES SCHOULER, LL.D.  
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"PERSONAL PROPERTY"

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By JAMES SCHOULER

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## PREFACE.

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The present volume contains the substance of my two former treatises on "Wills" and "Executors and Administrators," both of which have passed into three editions, now exhausted. This book is intended to supersede those two, by way of a new edition, so as to supply law students and members of the bench and bar with an elementary treatise for study and practical use, covering the whole jurisprudence of Wills and the Administration of Estates, testate or intestate, in England and the United States.

For the citation of other series than the official reports, in cases of the former editions, I am indebted to Philip Nichols, Esq., author of a standard treatise on the "Power of Eminent Domain." The Table of Cases has been prepared by a member of the Boston bar, competent and experienced; though many other cases are cited in these pages by book and page only. In all other respects I have personally prepared the present volume, making a thorough revision of the former text and notes, while adding the latest cases upon a personal examination and comparison. I have also made full use of the lecture



notes used by me while recently a Law School Professor in Boston and Washington. The whole work has been done with a full sense of personal responsibility.

Long experience convinces me that legal text-books will continue, as in times past, to fulfil a leading purpose in the education and mental aliment of the legal profession. But now that, with the great multiplication of State jurisdictions in America, and the vastly increasing legal business of communities largely independent of one another, our annual array of court decisions becomes prodigious and almost overwhelming in its general mass, the practitioner must rely much upon the great digests for full citation, and most of all upon his own local digests and local reports in their latest publication. For to every one in active practice the court decisions and statutes most nearly indispensable must be those of one's own State jurisdiction, and chief among these the very latest. Digests, when well classified and arranged, bring head-notes from the reports together; but they do not afford competent or comprehensive instruction. They present points passed upon for a given period, but they do not elucidate principles. Hence the text-book remains needful for professional guidance, to preserve the origin and history of the law, to teach and refresh the mind on elementary principles, and to trace the latest development and progress of the particular topic or branch of jurisprudence. New statutory changes of importance, new

judicial departures, should be noted and the course of different co-equal jurisdictions well compared. Nor should we lose sight of the fact that in many parts of our Union French or Spanish law has largely influenced local institutions, and not the English common law alone.

But the text-writer should keep to his own sphere. To expect at this day that the legal treatise upon some elementary subject shall compete with the annual digest in supplying the latest citations, English and American, in mechanical completeness—that one must stretch text and notes to the breaking point of enumeration, so as to afford extra pages and volumes of hazy exposition, to the added cost and burden of the profession,—is to expect too much. The author, to be sure, should still study the latest digests and decisions for himself and winnow for his own scholarly presentation of the law; and he should cite sufficiently for illustration; but his chief task remains to keep abreast and keep his reader abreast with the current. At all times he should counsel the consulting student or lawyer to search and examine, besides, whether or not the principles thus presented are modified or altered in his own local code and practice. And if, besides expounding with sufficient clearness and accuracy, the text-writer can interest by his style of composition, so much the better. Our great commentators, Blackstone and Kent, prepared their volumes from courses of law lectures; and so was it largely with the many treatises of

Judge Story in their original text. All such volumes were clearly written and prepared from collated decisions few enough as compared with those of the present day.

With health and favoring opportunity I have lately condensed and reduced to this new basis one after another of my law treatises, long known to the public. If any of them ever grow protuberant or costly again it will be through the labors of some other annotator or reviser. For myself, I may consider that, with the issue of this final volume, I have rounded to a close a long and busy professional career, as practitioner at the bar, author and instructor, covering nearly half a century.

JAMES SCHOULER.

APRIL 30, 1910.

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# BOOK I.

## THE LAW OF WILLS.

### PART I.

#### INTRODUCTORY CHAPTER.

##### NATURE AND ORIGIN OF TESTAMENTARY DISPOSITION.

1. A will may be defined as the solemn disposition of one's property, to take effect after death;<sup>1</sup> and in this disposition one fitly contemplates not only the purposes to which such property shall be devoted, but the person or persons by whom those purposes shall be executed, or carried into effect.<sup>2</sup>

2. "Last will" or "last will and testament" is the English phrase used from the earliest times as appropriate peculiarly to this solemn disposition, if not the indispensable means of denoting it. And, indeed, it should be observed that the use of the word "will" alone in this connection, rather than "testament," is confined to England and the countries whose language and jurisprudence are derived from the English source.<sup>3</sup> "Testament" comes

<sup>1</sup> Bouvier Dict. "Will"; Swinburne Wills, pt. 1, § 2; Godolphin, pt. 1, c. 1, § 2.

<sup>2</sup> Swinburne appears to have considered that the naming of an executor was indispensable to the validity of a will. Swinb. pt. 1, § 3; 1 Redfield Wills, 6, note. But modern opinion, English and American, is quite to the contrary. 93 N. Y. S. 1004. On the other hand, we find wills frequently made for the exclusive purpose of naming an executor; the property itself, in such a case, being intended to go, by way of descent and distribution, as if no will had been made. See Executors 122-127, *post*.

<sup>3</sup> "Testament" is the expressive word which the Roman civil law supplies in this connection; the continental jurists make use of no other; and our own professional men, British and American, not only prefer still to link the words "will" and "testament" together, whenever one draws up a written disposition of this sort for a client, but found upon the Latin *testamentum* exclusively the secondary forms most convenient for discussing our general subject. He or she who makes the will is to this day, in English law, the "testator" or "testatrix," as the case may be; one dies "testate," leaving a valid will at his death, or "intestate" without one; we speak of "testamentary causes," a "testamentary gift," a "testamentary guardian," and "letters testamentary"; while "will," on the other hand, as used in our law, affords not a single derivative.



readily to hand, coined for the convenience of jurists the world over; but "will," which is at best a secondary medium of expression, does not. We of the present day, however, may fairly treat "will," "testament," and "last will and testament" as legal terms standing, without practical difference, for one and the same thing.

3. The usual phrase of testamentary disposition being, "I give, devise, and bequeath," it is well to notice the significance of these several words. "Gift," in our law, is a word of considerable scope, corresponding to the Roman *donatio*; it embraces all voluntary transfers of property without consideration; and it appears well adapted to the language of one's last will and testament, inasmuch as the ruling motive of the testator is to confer of his own free will and gratuitously. "Devise" and "bequest" are words of more technical meaning. "Devise," properly speaking, is a gift of real property by one's last will and testament and cannot with legal precision be applied to things personal.<sup>1</sup> "Bequest," on the other hand, is a gift by will of personal property: and that word is inappropriate where the disposition relates to real estate.<sup>2</sup>

4. Property real, personal and mixed are found combined in a will.<sup>3</sup>

5. The term "legacy" is more commonly applied to money or other personal property, in this connection, than to real estate; but "devise" standing in technical contrast with "bequest" to mark a distinction, this word "legacy" acquires readily a popular sense, which regards rather the value of the gift than the elements, real or personal, of which it may happen to be composed.<sup>4</sup>

<sup>1</sup> Bouv. Dict. Formerly professional men were much inclined to narrow the definition of a last will and testament, so as to apply the term to personal property; using "devise" where real estate was operated upon. Cowp. 90, *per* Lord Mansfield. But the more general and popular definition of a last will and testament embraces both real and personal property as above. See 4 Kent Com. 502.

<sup>2</sup> Bouv. Dict. Out of favor to the manifest intent of a testator, as shown by the context of the will, courts will often in these modern days construe "bequest" into "devise," and *vice versa*, notwithstanding verbal inaccuracies of this kind; and yet, wherever a disposition is intended of real and personal property in combination, the phrase "devise and bequeath," or "give, devise and bequeath," is certainly the more elegant, as well as the more accurate and comprehensive expression to use, when drawing up a will.

<sup>3</sup> Schoul. Pers. Prop. § 4.

<sup>4</sup> Bouv. Dict. "Legacy." Technical accuracy in the use of these words, "devise," "legacy," and "bequest," is not insisted on in these days, so as to exclude the testator's obvious intent. Ladd *v.* Harvey, 1 Post. 514; Lallerstedt *v.* Jennings, 23 Ga. 571. Unlike "bequest," the word "legacy" has a corresponding word "legatee," to designate the person taking under the will.

6. Wills or testaments are of two kinds, written and unwritten; the latter being also designated in law as oral or nuncupative.<sup>1</sup> Nuncupative wills or testaments (which have a place in the Roman civil law) are so called from *nuncupare*, to name, declare or make a solemn declaration, because the testator declares his will *in extremis* before a sufficient number of witnesses whose oral proof must afterwards establish it.<sup>2</sup>

7. A codicil is in modern practice a sort of postscript to a will, being an exposition of the testator's afterthought.<sup>3</sup> This word is derived from the Latin word *codicillus*, which is a diminutive of *codex*, and literally imports a little code or writing—a little will. Codicils came into our law from the Roman jurisprudence, but with an earlier significance quite different from that which modern usage attaches to them.<sup>4</sup>

8. The generic word "will" includes "codicils," as a rule, wherever legal principles are stated.<sup>5</sup>

9. "Mystic" and "holograph" wills, derived from the civil law, deserve an express mention.<sup>6</sup> The "mystic testament" consists in enclosing one's instrument of disposition in an envelope and sealing it in presence of witnesses.<sup>7</sup> The "holographic (or olographic) testament" is written wholly by the testator himself.

<sup>1</sup> 2 Bl. Com. 500.

<sup>2</sup> These oral wills offer great temptation to fraud and perjury, besides occasioning much honest error, and the need of them lessens as the art of penmanship becomes more universal and writing materials abound. The Statute of Frauds, 29 Car. II, c. 3, laid them under various restrictions; and the tenor of legislation, English and American, at the present day is to invalidate them altogether, except as to soldiers in actual military service and mariners at sea. See Part III, c. 4.

<sup>3</sup> A codicil is not necessarily on the same sheet of paper with the original will or annexed to it in any way. It may be a separate instrument, like any will of later execution.

<sup>4</sup> See Domat Civil Law, p. ii, b. iv, tit. 1, § 1; Swinb. pt. 1, § 5; Bouv. Dict. "Codicil." As Blackstone observes, the codicil is the testator's addition annexed to, and to be taken as part of the testament: "being for its explanation, or alteration, or to make some addition to, or else some subtraction from, the former dispositions of the testator." 2 Bl. Com. 500; Godolph. p. 1, c. 1, § 3. He adds that the codicil may be either written or nuncupative. In short, the codicil is part of the will, and the last will and codicils constitute one testamentary disposition.

The objection to which all nuncupative instruments are liable applies equally to a codicil or a will. And under our modern rules of legislation the codicil or any later testament should be not only expressed in writing but executed with the same solemnity as an original instrument.

<sup>5</sup> Legislation is often found explicit upon this point.

<sup>6</sup> They come to us chiefly through our Louisiana and other acquisitions once under French or Spanish dominion.

<sup>7</sup> La. Civ. Code, art. 1577-1580. The envelope may be simply closed with mucilage. 48 La. Ann. 236; 19 So. 275.

It must be entirely written, dated, and signed by the testator's own hand; and being so prepared, it speaks for itself in some States as declaring his last will, so as to be subject to no formality of witnesses.<sup>1</sup>

10. A will or testament acquires no force as such until after the death of the testator. It may, therefore, be revoked or cancelled as well as altered by the testator at any time during his life provided the intent and the suitable act concur.<sup>2</sup> For every testament is consummated by death, and until he dies, the will of a testator is but ambulatory.<sup>3</sup> Hence, if the testator leave two or more inconsistent testaments behind him, the last shall prevail to the exclusion of every earlier one.<sup>4</sup>

11. A statute passed after the making of a will, but before the death of the testator, by which the law is changed, takes effect upon the will.<sup>5</sup> But, however it may be as to the legal operation of a valid will upon one's property, the rule is that if the testator was, at the date of making the will, without testamentary capacity, as in the case of a married woman, a subsequent statute which comes into force and remains so at the time of her death will not turn the invalid testament into a valid one.<sup>6</sup> And in general the legality of the execution of a will should be judged of by

<sup>1</sup> La. Civ. Code, art. 1581; *Wilbourn v. Shell*, 59 Miss. 205, 42 Am. Rep. 363. And see *Bouv. Dict.* "Testament"; Part III, *post*; 4 Kent Com. 519, 520.

<sup>2</sup> Part IV, *post*.

<sup>3</sup> "Nam omne testamentum morte consummatum est; et voluntas testatoris est ambulatoria usque ad mortem." Co. Litt. 112; 2 Bl. Com. 502. "For where a testament is, there must also of necessity be the death of the testator. For a testament is of force after men are dead: otherwise it is of no strength at all while the testator liveth." Hebrews ix, vs. 16, 17.

<sup>4</sup> This ambulatory quality of a will has been often pointed out as its prominent characteristic, distinguishing it, in fact, from ordinary dispositions by a living person's deed, which might, indeed, postpone beneficial possession or even a vesting until the death of the disposer, and yet would produce such postponement only by its express terms under an irrevocable instrument. Even though a will should in terms be made irrevocable, the testator may revoke it. 8 Co. 82 a.

<sup>5</sup> *Wakefield v. Phelps*, 37 N. H. 295, 102 N. Y. S. 808; *Kopmeier, Re*, 89 N. W. 134, 113 Wis. 233.

Nevertheless, a retroactive effect should not be given by such later statute to an earlier will as to render, by the mere force of a new rule of construction, a different disposition under that will from what the testator obviously intended; especially if the legislation manifested no retroactive intention. See *Carroll v. Carroll*, 16 How. 275, 128 L. Ed. 936; *Cushing v. Aylwin*, 12 Met. (Mass.) 169, 8 Cr. 66; *Gable v. Daub.* 40 Penn. St. 217. As to the surviving husband's interest in his wife's property, where the statute changes, see *Perkins v. George*, 45 N. H. 453; *Johnson v. Williams*, 152 Mass. 414, 25 N. E. 611.

<sup>6</sup> *Kurtz v. Saylor*, 20 Penn. St. 209; 179 Penn. St. 580; 57 Am. St. Rep. 516, 36 A. 344; *Dwarris Stat.* 685.

the law as it was when it was executed, and not as it was at the death of the testator.<sup>1</sup>

12. A few words as to the origin of wills are here appropriate. Upon this topic history preserves, indeed, but very little. Writers upon natural law, it is true, conceive of a primitive state of society, where, property vesting by common consent in the individual under the right of occupancy, that right, nevertheless, continued in the occupier only while he lived. But strife and confusion at the awful period of religious rites and burial must have seemed intolerable even to barbarians of the basest type; and decency soon framed a system by which the title of the dead proprietor descended at once, and with it, most probably, the responsible management of the funeral.<sup>2</sup>

<sup>1</sup> Mullen v. McKelvy, 5 Watts (Penn.) 399; Prec. Ch. 77; Amb. 550; 3 Atk. 551.

A statute which changes the rules of evidence or method relating to the execution of wills has no retrospective operation; and a will must be proved as the law required at the date of its execution. Giddings v. Turgeon, 58 Vt. 106 (where a will at the date of execution was invalid if one of the three witnesses was husband of a legatee, and the legislature afterwards changed the rule); Lane's Appeal, 57 Conn. 182; 17 A. 926; 14 Am. St. Rep. 94. In this last-mentioned case the whole subject is discussed. If the local statute expressly reserves the validity of former wills, the point is clear. 1 Bradf. (N. Y.) 252.

<sup>2</sup> Puffendorf Law of Nations, Book 4, c. 10; 2 Bl. Com. 490. "The law of very many societies has, therefore, given to the proprietor a right of continuing his property after his death, in such persons as he shall name; and in defect of such appointment or nomination, or where no nomination is permitted, the law of every society has directed the goods to be vested in certain particular individuals, exclusive of all other persons." 2 Bl. Com. 490. The former method of acquiring, as the learned commentator adds, is called a *testament*, the latter an *administration*. Ib.

For the progress of individual ownership and succession, as fundamental ideas of primitive society contrasted with occupancy for a lifetime, we may well conceive of these three stages: (1) Appropriation by government, that is to say, by the strongest survivor surrounding the deceased, whether as trustee for the common society, or rather in the semblance of an armed chieftain grasping for himself and his line. (2) The promulgation of a general scheme by that government or that chieftain in obedience to the profound affections of individuals, whereby the inheritance vested in a member or members of the decedent's own family. (3) Recognition of a right in the individual owner to dispose of the title at his own choice and in variance, if need be, of the usual rules of inheritance. In this last recognition by society lies the sanction of a will; and this sanction reaches its refinement when we find the dead proprietor's wishes so far respected by the government, by his fellow-men, that he may safely disinherit, or transmit to strangers, or provide for the default of his own kindred, or bestow at pleasure upon selected objects of charity, by the formal declaration of his last wishes to that effect. And yet, as leading up to such a conclusion, we should remark, that from the moment that the doctrine and practice of transfers of property *inter vivos* by way of gift, sale, or bailment became established, men's minds were prepared for recognizing a transmission of title beyond the span of any occupant's own life. If, moreover, the owner could not lawfully make a testamentary disposition, he might, when dying, with full opportunity to do so, divide his property among those who stood at his bedside, and thus dispose of it *sui juris*, without a strict succession at all.

13. Whatever authentic history teaches us of the origin of the human race, confirms the opinion that the practice of allowing the owner of property to direct its destination after his death, or at least of imposing general rules of inheritance, is coeval with civilization itself and so close, in fact, upon the origin of property and property rights, as not to be essentially separated in point of antiquity. To take the Sacred Writings, for instance. The first rule was exercised by a founder over his own family. The patriarch gave his dying blessing, and, as it would appear, transmitted his own property to his descendants, regulating the inheritance at discretion; at all events, he was familiar with some scheme of inheritance which provided, not only for children or kindred, but for the contingency of their failure.<sup>1</sup> If we turn to the Vedas, the oldest authority for the religious and social institutions of the Hindoos, the result is not different.<sup>2</sup> Homer's Iliad, once more, furnishes fair illustrations of oral testament and bequest, as well as of inheritance.<sup>3</sup>

<sup>1</sup> Abraham, our earliest type of the prosperous father of a family, amassing property in the midst of a civilized and peaceful society, who journeyed to Egypt, who grew very rich in cattle, servants, silver and gold, who paid out his thousand pieces of silver for a piece of land, and was respected far and wide as a man of wealth, is seen considering, while childless, who would be his heir, and after rearing children late in life and marrying more than once, giving all that he had to his oldest legitimate son, Isaac, at his death, and sending the sons of his concubines away with gifts. Isaac gives solemnly his death-bed blessing to the younger son by an error which he refuses, upon discovering it, to retract. Jacob bequeaths to his son Joseph a portion of his inheritance double that of his brethren. Gen. ch. xiii, xv, xxv, xxvii, xlviii. All of these seem to afford instances of death-bed disposition at patriarchal discretion; though Blackstone and other writers fasten upon that of Jacob alone as the more authentic, and perhaps the earliest recorded instance of the early use of testaments. 2 Bl. Com. 490, 491. That verbal testaments preceded written ones is altogether likely. And this very word "testament," which came down to us with the most sacred of associations, means, as a New Testament writer argues, not a mere covenant of God with the living, but something symbolical, which, like all testaments, requires death or the dedication of blood, to give it effect. Hebrews ix, vs. 16-18.

<sup>2</sup> Whether these ancient hymns offer plain instances of a disposition by testament, Sanscrit scholarship must determine; but certainly they depict a society where laws of succession as well as of transfer *inter vivos* are in full force, and the male issue (not wholly, perhaps, excluding the daughters) inherit and at the same time perform the funeral rites. 2 Wilson's Rig-Veda Sanhita, xvii.

<sup>3</sup> See, e.g., as to Patroclus, Iliad, 23d book, lines 90-93, 250-255, Chapman's translation.

Respect for fundamental rules of inheritance may, nevertheless, have prevailed in various countries and ages as against the free license of a testamentary disposition. Whether the early exclusion of wills in Greece and Rome was absolute or only partial, and whether there might not have been permitted in some of these excepted instances a testamentary disposition of a certain sort, approximating a death-bed gift, especially if just in itself, it is not our province to inquire. See 2 Bl. Com. 491. Certainly the practice of transferring what one owns so as to take effect by one's direction after death seems so reasonable and natural of itself that we may well conceive that it has existed always and everywhere in civilized society, with rare exceptions; though

14. In England the right of testamentary disposition has been recognized from the earliest times; and a passage in the old law before the Conquest indicates that a Saxon nobleman would hardly have died intestate unless carelessness or sudden death prevented him from making his will.<sup>1</sup> Nevertheless, there is good reason to believe that the general right of inheritance was firmly established in our mother-country earlier than that of disposition by will; and that until times comparatively modern, one's testamentary right remained obstructed by certain arbitrary rules of feudal exaction or distribution.<sup>2</sup> But all former restraints upon the testamentary power are at all events abolished in England by the statute 1 Vict. c. 26 (A. D. 1837), known as the Statute of Wills.<sup>3</sup>

15. The ancient "devise," related in earlier days to real, as strictly distinguished from personal property. It appears that lands in England were devisable by will prior to the Norman Conquest.<sup>4</sup> Then was established the feudal system, and the feudal incumbrance, imposed upon lands held in tenure, that alienation could not take place without the consent of the lord; and the power of devising was restrained accordingly.<sup>5</sup> Once more, then, we reach the statute of 1 Vict. c. 26, by which all restrictions

it would not be strange if rude and property-despising people, like the ancient Germans and the Spartans under Lycurgus, condemned it. 2 Kent Com. 502 advocates the right of testamentary disposition in the interest of society, guarded as it is against abuse by the irresistible influence of our domestic affections.

The formalities and restrictions which refined nations now impose upon this individual right are chiefly in order to make clear a testamentary intention, to prevent a testator from unjustly discriminating against those of his own immediate family, or for warding off in the courts a false interpretation; in any case fairly but not violently upholding the general laws of inheritance against unnatural caprice or fraud.

<sup>1</sup> 2 Bl. Com. 491, citing LL. Canut. c. 68.

<sup>2</sup> See former doctrine of "reasonable parts" and of exactions by Crown and Church as to all other personal property remaining. 2 Bl. Com. 492, 493, 495.

<sup>3</sup> Earlier legislation led to this change of law, which was, indeed, so gradual that Blackstone, observing that in his own time one might by will bequeath the whole of his goods and chattels, declared himself unable to trace out when first the alteration began. 2 Bl. Com. 492, 493.

<sup>4</sup> 2 Bl. Com. 373; 4 Kent Com. 503.

<sup>5</sup> This incumbrance, against which struggled family affection and the desire of independent dominion, yielded sooner where lifetime alienations were concerned than in dispositions to take effect after death. But the cunning of a feoffment to uses introduced a means of evasion whereby one could effectually devise his land until the Statute of Uses, 27 Hen. VIII, destroyed the privilege. Scarcely five years later, however, another statute of the same reign (32 Hen. VIII) long styled the Statute of Wills (as amended by 34 Hen. VIII) gave a broad sanction to the practice of devising lands directly; until by a statute of Charles II the last traces of feudal tenure were abolished, and the disposition of real property by will was rendered absolute.

<sup>4</sup> Kent Com. 504, 505; 2 Bl. Com. 373, 374.

are now removed from the disposition of property in England, whether real or personal.<sup>1</sup>

16. Each of the United States has its own Statute of Wills, with variations to be noticed hereafter. But as neither feudal tenure nor the doctrine of "reasonable parts" with Church and Crown ever had a clear footing in this country, the American rule is, and has been, that any one of suitable capacity may dispose of his real and personal property without restriction, by a will duly executed with the prescribed formalities. Nor is it usual to require different formalities for different kinds of property, but to apply one rule to all of a testator's property, real, personal or mixed, so that all may be comprehended in the same testamentary instrument.<sup>2</sup>

17. Now to consider the rule of succession as it stands at the present day in England and the United States.<sup>3</sup> Upon the property, real and personal, of every one who dies it may be said that one or another of two schemes of legal disposition operates. (1) There is the will of the State; or, as the familiar phrase goes, the will which the law draws up. (2) There is the will which the individual has made for himself. In the former consists the expression of the public, of legislation, presenting what the State deems a fair scheme for settling the great majority of estates; in the latter, that which the owner has chosen to suit his special circumstances, and which like any contract admits of the widest variety of forms.<sup>4</sup> The above expression is, of course, to be understood

<sup>1</sup> See Stat. 1 Vict. c. 26 (A.D. 1837), § 3.

<sup>2</sup> The English Statute of Frauds and Perjuries, 29 Car. II c. 3, which directs that all devises shall be in writing, signed by the testator, and subscribed in his presence by a stated number of credible witnesses, is at the foundation of our American legislation on this subject. 4 Kent Com. 505.

<sup>3</sup> The word "succession" as used in the present connection is one of civil rather than common law jurisprudence. But it is very convenient for denoting the general devolution of title in property by death, whether by testament or without one, and no term of the common law can well supply its place. See Bouv. Dict. "Succession;" Louisiana Code, etc.

<sup>4</sup> It sometimes happens that the individual scheme as set forth coincides with that of the State; possibly, too, one's own will may have comprehended but part of his property, leaving the will of the State to impress the residue; but more commonly the individual scheme seeks to work out a total disposition of its own, differing from that of the State. One who leaves no will of his own may, perhaps, be thought to have accepted that of the State; the latter operating, as it is said, "according to the will of the deceased, not expressed, indeed, but presumed by the law." Puff. Law of Nations, lib. 4, c. 11; 2 Bl. Com. 490. But no such presumption is essential; for though inadvertence, sudden death, non-compliance with legal forms, or other cause, should account for its absence, the individual will is not so greatly respected by the public that the general scheme, the will which the law draws up should not be allowed with the utmost confidence to operate exclusively upon the decedent's estate in such a case.

figuratively; for in the literal sense of our law, the operation of the will of the State furnishes the case of *intestacy*, but that of the individual's own will the condition of dying *testate*.

18. **Where, then, does the will of the State continue paramount to that of the individual?** Or, in other words, what constraints does public policy still place upon one's power of testamentary disposition? confident that for the average of estates its own scheme is the better, still in no case permitting that the succession of local jurisdiction shall fall outside of both schemes. (1) Wherever the individual, because of unsound mind, indiscretion, or some special subjection in his surroundings to fraud and undue influence, must be deemed incapable of making the will. (2) Wherever the individual will in question is not executed with all the formalities which public policy has seen fit to prescribe for the prevention of fraud and uncertainty. (3) Wherever the individual, though he made a will, is considered to have revoked it, directly or by a vital change of circumstances. (4) Where, under the circumstances, there has been some inconsistent mutual arrangement of property between parties, giving rise to what is known as their joint or mutual wills, or where, perhaps, there was consideration for a testamentary provision.<sup>1</sup>

19. (5) (6) **Husband and wife are protected, to a certain extent, against the testamentary caprice of each other.** Here the decedent may have left a valid will, duly executed, never revoked, and not inconsistent with any other arrangement made upon consideration; and yet public policy on behalf of the survivor obstructs certain provisions of that will and sets them aside, as too unjust to operate.<sup>2</sup>

20. (7) **Children are not allowed any such privilege of waiver;** yet public policy does not permit them to be cut off from their

<sup>1</sup> All these matters will receive extended treatment presently, and it may truly be said in some of the above instances that the individual who died left no will of his own behind him. See Parts II-V.

<sup>2</sup> (5) In many American States a widow may waive the provisions of her husband's will on her behalf and take her dower and a stated share of his personal property instead; or, as some of our codes provide, she is entitled to her just share of her husband's real and personal estate without a waiver at all. See Stimson's Am. Stat. Law, § 2841; Heineman's Appeal, 92 Penn. St. 95; Comstock v. Adams, 23 Kan. 513, 33 Am. Rep. 191; Ward v. Wolf, 9 N. W. 348, 56 Iowa 465; Little, Re. 22 Utah 204, 61 P. 899. (6) Now, too, that a married woman may make a will without her husband's concurrence, a restraint is placed upon her own arbitrary disposition to his disfavor, which fairly enough may result in allowing to both spouses a corresponding waiver of provisions as survivor. See Hayes v. Seavey, 46 A. 189, 69 N. H. 308; Morrow's Estate, 54 A. 342, 204 Penn. 484; Kelley v. Snow, 70 N. E. 89; 185 Mass. 288.



inheritance by any testamentary indirection. A child not expressly provided for under the parental will shall take his share as in case of intestacy, unless it appears that the testator had otherwise provided or that such omission was intentional. Posthumous offspring come within the same rule of protection; for, though not named in the parental will, they take the share which the State testamentary scheme prescribes.<sup>1</sup>

21. (8) **Gifts under the individual's will which fetter unreasonably long** the free circulation of property are now pronounced void; our rule being that any limitation (unless for charitable uses) which locks up the fund for a longer period than a life or lives in being, and twenty-one years beyond (allowing, in case of a posthumous child, a few months more for the term of gestation), is void. And according to modern construction, it is not enough that an estate may vest within this period, to avoid objections of perpetuity, but the rule is that it must so vest.<sup>2</sup>

<sup>1</sup> Legislation favorable in these respects to omitted children or issue, whether born before or born after the will, may be found in nearly all of the American States; yet the parental right to disinherit exists and may be sufficiently shown on the face of the will. See Stimson's Am. Stat. Law, §§ 2842-2844, where shades of statutory distinction are noted. Each local code should be locally consulted. No mention of children may practically result in no will. *Bloom v. Strauss*, 69 S. W. 548, 70 Ark. 483. Posthumous children may have rights under a will independently of statutes especially mentioning them. *Pearson v. Carlton*, 18 S. C. 47; *Clarke v. Blake*, 2 Ves. 673.

The language of some statutes permits of parol proof, outside the will itself, that the testator actually intended to omit the child in question. *Bancroft v. Ives*, 3 Gray, 367; 6 Met. 400; 39 Am. Dec. 736. *Peters v. Siders*, 126 Mass. 135, 30 Am. Rep. 671; *Coulam v. Doull*, 133 U. S. 216, 33 L. ed. 596 (against rule of California). See *McCulloch's Appeal*, 113 Penn. St. 247, 6 A. 253; *Arnold v. Arnold*, 62 Ga. 627.

Posthumous children at their birth take vested interests in their deceased parents' estate, subject to the contingencies of administration. *Knotts v. Stearns*, 91 U. S. 638, 23 L. ed. 252; *Catholic Assoc. v. Firmane*, 50 Mich. 82, 14 N. W. 707.

But unintentional omission is not to be set up to defeat the regular probate of the will. *Doane v. Lake*, 32 Me. 268, 52 Am. Dec. 654. Nor does a mere omission infer testamentary incapacity. *Kaufman v. Caughman*, 49 S. C. 159, 61 Am. St. Rep. 808. See further, 14 Phil. 327; *Smith v. Robertson*, 89 N. Y. 555; *Wilson v. Fritts*, 32 N. J. Eq. 59; 5 Dem. (N. Y.) 374; 49 Am. Dec. 275; *Sewall v. Welmer*, 132 Mass. 131; *Dunlap's Appeal*, 16 Penn. St. 500.

<sup>2</sup> 1 Sch. Pers. Prop. §146; *Bengough v. Eldridge*, 7 Sim. 173; *Rand v. Butler*, 48 Conn. 293; *Odell v. Odell*, 10 Allen, 1; *Anthony v. Anthony*, 55 Conn. 256, 11 A. 45.

Statute provisions prevail on this subject in leading States. In New York the prescribed period of limitation is two lives in being. See Stimson's Am. Stat. Law, §§1440-1442; *Eldred v. Meek*, 55 N. E. 536, 183 Ill. 26; 74 N. E. 804, 216 Ill. 236; *Central Trust Co. v. Egleston*, 77 N. E. 989, 185 N. Y. 23.

Thus, a gift to the children of "any son" of a life tenant is too remote, and it cannot be shown that the life tenant was past child-bearing at the testator's death. 39 Ch. D. 155. A bequest in perpetuity to keep the testator's private burying-ground in repair is bad. 79 Ala. 419, *Kelley v. Nichols*, 17 R. I. 306, 21 A. 906. But local statutes come frequently in aid of bequests to provide for perpetual care of one's burial lot. A bequest in perpetuity to keep a clock in repair is void. *Kelly v. Nichols*, 17 R. I. 306, 21 A. 906. And see among various other cases, *Haynes v. Sherman*, 117 N. Y. 433, 22 N. E. 938.

This rule against perpetuities applies to both capital and income.<sup>1</sup>

21a. (9) Gifts under a will to "superstitious uses" are likewise prohibited; though English legislation of this sort directed against the offices of the Roman Church is not approved to the fullest extent in this country; nor do the courts here or abroad incline now to assert such a policy so boldly or so harshly as half a century or more ago. On the other hand, legacies and bequests to charitable uses have long been favored, both in England and the United States.<sup>2</sup>

22. Where subversive of sound policy and good morals, a devise or bequest will be held void, and the executor is justified in not paying it. Thus, conditions tending to promote separation or divorce between husband and wife are treated as void; though it is otherwise with conditions which merely restrain from marriage or remarriage.<sup>3</sup> To the same general principle of good morals and sound policy may be referred various other constraints upon testamentary disposition which local law sees fit to impose.<sup>4</sup>

Where such gifts by will cannot be separated, the whole must be treated as void for remoteness. *Harvey, Re*, 39 Ch. D. 289. Otherwise where the gifts can be separated and part upheld as valid. *Vaughan, Re*, 33 Ch. D. 187. A gift over after the performance of a trust, void for perpetuities, is also void. 56 N. J. Eq. 275, 38 A. 424. See *Tyler, Re* (1891), 3 Ch. 252.

<sup>1</sup> See, however, the English "Thellusson act," which puts a still closer constraint upon the prospective accumulation of income. 1 Sch. Pers. Prop. §147. American Legislatures have not uniformly adopted so just a distinction. *Stimson's Am. Stat. Law*, § 443; 41 Mich. 552, 2 N. W. 814.

<sup>2</sup> 1 Co. 22; *Cary v. Abbott*, 7 Ves. 490; 20 R. I. 446, 40 A. 11. English cases of earlier days went so far as to avoid residuary bequests made for educating children in the Roman Catholic faith. 1 Jarm. 205; *Cary v. Abbott*, *supra*. All such bequests are permitted by the law of American States, for religious toleration is widely practised, and we have no established church. The chief doubt arises where a gift is made for masses, prayers for the repose of the testator's soul, etc. In England such a gift has been treated as invalid. *West v. Shuttleworth*, 2 My. & K. 684. But the American inclination is to permit such gifts to stand. *Powers' Estate*, 134 Mass. 426; *McHugh v. McCole*, 97 Wis. 166, 72 N. W. 631, 65 Am. St. Rep. 106; *Johnston v. Hughes*, 80 N. E. 373; 187 N. Y. 446 (hospital); *Martin v. Bowdern*, 59 S. W. 227, 158 Mo. 379.

<sup>3</sup> *Conrad v. Long*, 33 Mich. 78, 603 *post*; 85 Mo. App. 169.

<sup>4</sup> Thus, under the Louisiana code a will made in favor of the testator's concubine is treated as null and void. *Gibson v. Dooley*, 32 La. Ann. 959. Cf. *Donnelly, Re*, 68 Iowa, 126, 26 N. W. 23; *Sunderland v. Hood*, 84 Mo. 293; 82 Ky. 93, 56 Am. Rep. 880; *Beatty v. Richardson*, 34 S. E. 73, 56 S. C. 173. A will made in favor of one's paramour is not *per se* void because of the illicit inducement. 159 Penn. St. 630, 28 A. 448; *Ruffino's Estate*, 116 Cal. 304, 48 P. 127; *Arnault v. Arnault*, 52 N. J. Eq. 801, 805, 31 A. 606 (carrying the doctrine to an extreme limit). Undue influence is often found an element in wills which bequeath property thus. *McClure v. McClure*, 86 Tenn. 174; *post* 229, 236, 237.

The question of what contravenes sound policy and good morals is for the court, not a jury, to decide. *Smith v. Du Bose*, 78 Ga. 413, 6 Am. St. Rep. 280. And as to illegitimate children, our law has had a varying purpose to exclude them from the benefits of a will. See *Schoul. Dom. Rel.* § 281; 105 N. W. 1064, 126 Wis. 660;

23. **Personal incapacity to take under a will applies by exception.**<sup>1</sup> Thus alien enemies may still be found locally prohibited on grounds of policy, with those also whose participation might be called immoral.<sup>2</sup> Precaution against fraud has furnished a ground for declaring all legacies and devises void when made to the essential subscribing witness of a will.<sup>3</sup> By this means, harsh though it may seem, the witness becomes competent, because disinterested.<sup>4</sup>

24. **Bodies politic and corporate were once expressly prohibited from taking** by devise; and this disability operated equally, whether the corporation were aggregate or sole, and even though the devise were in trust instead of beneficial. Statute 1 Vict. c. 26, however, contains no such prohibition, but leaves the corporate capacity to take under a will dependent upon general principles; and the usual principle here operative is that the corporation may indeed take land but cannot hold and exercise full dominion without a license.<sup>5</sup> The exception noticed is seen to relate to lands. At common law corporations apparently have been equally entitled with individuals, to take personal property by bequest; and various American decisions fortify such a theory.<sup>6</sup> But limitations and restrictions under the local act of incorporation should always be regarded; to the extent, at least, of procuring an enabling act

Frogley, *Re*, (1905) Prob. 137. Illegitimates favored under a gift to children. 37 Ch. D. 695; *Smith v. Du Bose*, 78 Ga. 413, 6 Am. St. Rep. 260; L. R. 9 Ch. 147. But as to future illegitimate children, see *Bolton, Re*, 31 Ch. D. 542; *Hastie's Trusts*, 35 Ch. D. 728. See 37 S. C. 537, 16 S. E. 614. Doubtless the local conception of public policy on such points is liable in different jurisdictions and at different epochs to great variation, and decisions must greatly vary in consequence.

<sup>1</sup> As to alien friends the incapacity formerly existing in England appears to have been removed by legislation of 1870. In the United States an alien may take lands by grant or devise; but he cannot hold it at common law against the State. He may also take a legacy for his own benefit. Treaties made by the United States with a foreign power in such matters constitute the supreme law of the land. See next c.

<sup>2</sup> On the ground that no one shall profit by his own crime, it has been declared that a beneficiary who murders the testator cannot take under his will. *Riggs v. Palmer*, 115 N. Y. 506; 12 Am. St. Rep. 819, 5 L. R. A. 340, 22 N. E. 188. *Contra*, *Owen v. Owen* 100 N. C. 240; 6 S. E. 794. This doctrine is a salutary one, though novel. Possibly the fraudulent concealment of a pre-existing marriage might defeat a bequest given to one as a *bona fide* spouse. *Donnelly, Re*, 68 Iowa, 126, 26 N. W. 23.

<sup>3</sup> See 350-357.

<sup>4</sup> See *post*, Part III., c. 3.

<sup>5</sup> 1 Jarm. Wills, 65, 66; 34 Hen. viii, c. 5; 1 D. & W. 258.

<sup>6</sup> *Phillips Academy v. King*, 12 Mass. 546; 24 Pick. 151; 35 Am. Dec. 312; 9 Cow. 437; 18 Am. Dec. 516; *Gibson v. McCall*, 1 Rich. 174; *Thompson v. Swoope*, 24 Penn. St. 474.

from the legislature to hold the property wherever the charter privileges would otherwise be transcended.<sup>1</sup>

25. **A.though infants and insane persons are under legal disability to act for themselves**, such persons are not incapacitated from becoming devisees or legatees under a will. For not to speak of the acts of a guardian done on behalf of one not *sui juris*, the latter's acceptance of what is beneficial to him may be readily presumed, and such a principle applies to gifts in general, so long as the gift be not injurious in itself but the reverse.<sup>2</sup> As for coverture, any married woman or a widow may be a beneficiary.<sup>3</sup>

26. **In testamentary interpretation the judicial disposition increases**, to seek out and give reasonable effect to a testator's wishes, though the dark envelopment of ambiguous and inaccurate phraseology; yet provisions which of themselves are unkind, destitute of natural affection, foolish, unjust, or hopelessly vague and uncertain, are not strained into place out of any undue solicitude for what the individual intended. Against any such gifts the law's testamentary scheme may well be suffered to prevail.<sup>4</sup>

27. **All of the points thus enumerated should be taken well into account whenever** the individual proposes to substitute a testamentary scheme of his own for that of the State; or, in common parlance, to have his estate settled after his death as *testate* instead

<sup>1</sup> Enabling acts of this character are frequent in the special legislation of American States at each session. Generally in the United States a devise of real or bequest of personal property may be made to any person or corporation capable by law of holding such real or personal property. Stimson's Am. Stat. Law, § 2610. But charter limitations as to the amount of property a corporation is entitled to hold may deprive even an educational institution from taking an additional legacy. See Cornell University case, 136 U. S. 152, 34 L. Ed. 427, sustaining 111 N. Y. 66, 2 L. R. A. 387; Santa Clara Academy v. Sullivan, 116 Ill. 375; American Bible Society v. Marshall, 15 Ohio St. 537; Inglehart v. Inglehart, 204 U. S. 478, 51 L. Ed. 575; 27 S. C. 329; 123 Cal. 614, 44 L. R. A. 364, 56 P. 461.

Various statutes forbid or restrain devises or bequests made to a corporation, even for religious or charitable purposes, shortly before a testator's death, especially when to the prejudice of the widow or issue surviving. Gregg's Estate, 62 A. 856, 213 Penn. 260; 123 Cal. 614, 44 L. R. A. 364; McCauley's Estate, 71 P. 458, 138 Cal. 546; Theobald v. Fugman, 60 N. E. 606, 64 Ohio St. 473; Phenix v. Columbia College, 72 N. E. 149, 179 N. Y. 592; Crane's Will, 54 N. E. 1089, 159 N. Y. 557 (municipal corporation exempted). See 55 N. E. 568, 161 N. Y. 122 (devise to trustees).

Whether an unincorporated society may take under a will, see Tucker v. Seaman's Aid Society, 7 Met. 188; Downing v. Marshall, 23 N. Y. 366, 80 Am. Dec. 240. Such a society may be refused when its objects are against good policy and morals. Zeisweiss v. James, 63 Penn. St. 465, 3 Am. Rep. 558; Frederick v. Lyford, 79 N. E. 1105, 187 N. Y. 524.

<sup>2</sup> Schoul. Pers. Prop. § 90; De Levillain v. Evans, 39 Cal. 120; Gardner v. Merritt, 32 Md. 78, 3 Am. Rep. 115.

<sup>3</sup> Schoul. Dom. Rel. §§ 83, 103, 191.

<sup>4</sup> Every doubt may thus be resolved in favor of a just and sensible disposition, and not the reverse. See Part VI, *post*.

of *intestate*. Under such various divisions are fairly comprised those restraints which modern law and policy place upon testamentary disposition. The disregard of such restraints should operate a total or partial intestacy, according to circumstances.<sup>1</sup>

28. **All the property which one owns may be disposed of by his last will and testament; and this embraces equally all the real and all the personal property to which he shall prove entitled, legally or beneficially, at the time of his death. Corporeal and incorporeal rights, with such future or contingent interests as deserve the name of property at all, are herein included.**<sup>2</sup> And the

<sup>1</sup> See Part VI, *post*.

<sup>2</sup> Consult the language of local statutes on this point. *Bailey v Hoppin*, 12 R. I. 560; *Ingilby v. Amcotts*, 21 Beav. 585 ("seized"). Language in a will which expressly refers to the present time must, however, receive that construction. And specific gifts of stock or other property have naturally a present reference. 1 Redf. Wills, 380, 381; 14 Sim 248.

Hence, a testator in whom is the legal title to lands which he had sold by a written contract, can transfer by his will both the title and the notes given for the purchase-money. *Atwood v. Weems*, 99 U. S. 183, 24 L. Ed. 471. Any equitable interest founded in articles of agreement for a purchase will thus pass. 8 Ad. & E. 14; 1 Wend. 625. But see 3 Johns. Ch. 307. But in case of an uncompleted contract of this kind the right or liability of the party at his death governs the question between those who may claim under him. 10 Ves. 597; *Lysaght v. Edwards*, 2 Ch. D. 516. All contingent estates of inheritance, including springing and executory uses and possibilities coupled with an interest, and contingent remainders are devisable, if the person to take be ascertained. 1 Ves. Sen 391, 411; 10 Paige, 41; 4 Kent Com. 261; *Loring v. Arnold*, 15 R. I. 428. Vested estates are doubtless devisable, though liable to be defeated by the happening of some subsequent event or the non-performance of some condition. 1 Redf. Wills, 390; 1 P. Wms. 563; *Winslow v. Goodwin*, 7 Met. 363; *Ingram v. Girard*, 1 Houst. 276. *Ib.* But there can be no devise, more than a transmission *inter vivos*, of a possibility where the person to take is not ascertainable; nor of any mere naked and remote expectancy coupled with no interest. 4 Kent Com. 262; *Upington v. Corrigan*, 151 N. Y. 143, 37 L. R. A. 794, 45 N. E. 359; *Methodist Church v. Young*, 40 S. E. 691, 130 N. C. 8. As for estates of which the grantor has been wrongfully disseised, claims of this character may be pursued in equity, and so by good reason they ought to be capable of testamentary transfer. Hence a right of entry after disseisin, a right to set some transaction aside, should pass under a will; and local statutes may be found which expressly make such rights transmissible in this manner. *Gresley v. Mousley*, 4 De G. & J. 78; *Humes v. McFarlane*, 4 S. & R. 435; *Varick v. Jackson*, 2 Wend. 166, 19 Am. Dec. 571; *Watts v. Cole*, 2 Leigh, 664. See *Steel v. Cook*, 1 Met. 281. The right of entry against a mere adverse possessor, not founded in actual disseisin, is unquestionably devisable. *Doe v. Hull*, 2 D. & R. 38; 1 Jarm. 50. But one who is wrongfully seised cannot transmit a rightful interest. *Smith v. Bryan*, 12 Ire 11. One cannot give by will more than he owns. 76 N. E. 856, 219 Ill. 568. And wherever one has already conveyed or transferred property to another, his subsequent will does not operate upon it. See 52 Fed. Rep 521.

To claims for damages founded in tort the usual rules apply; and the survival of the action or not, is a material point for consideration, whether the injured party died testate or intestate. Estates held strictly in joint tenancy pass by a familiar rule to the survivor, while those held in common are transmissible. But the modern presumption, favored by legislation, construes a conveyance or devise to two or more to create a common rather than joint relation. See further, *post*, as to what comprise assets of a deceased person's estate, Exrs. & Admsrs., 198-228.

One may dispose of an insurance policy upon his own life by will. His widow and children have no claim thereto by way of obstruction. *Williams v. Carson*, 9 Baxt. 516; *Hamilton v. McQuillan*, 82 Me 204, 19 A. 167; 83 Me. 295, 22 A. 173; 88 Ala. 241, 6 L. R. A. 140; 6 S. 380.

disposition regards presumably such property, real or personal, as the testator may be entitled to when the will comes into force, rather than what merely he may have had at the time of its execution; for it is according to the state of his affairs as they exist at his death that any deceased person's estate must be actually settled.

29. **Personal property acquired by the testator after making his will** and during his life is transmissible to a legatee, under general expressions of the will consistent with that intent, and one's testament may at all events assume to dispose of it.<sup>1</sup> To the devise of after-acquired real estate, technical objections were long interposed by the courts on the theory of a seisin; for the testator, it was said, ought to be seised of the estate when he makes a will, and so on through all the intervening period to the date of his death; otherwise, the estate would not be supported.<sup>2</sup> But local legislation has at length changed largely that rule for one more flexible and consonant to testamentary intent; namely, that one's will may operate upon his after-acquired real estate whenever such was his obvious intention.<sup>3</sup> Parliament too has similarly altered the rule in England.<sup>4</sup>

30. **We now proceed to treat in detail of the law of wills**, that is to say, of individual testaments. To the intended testacy of the individual we confine our present investigation; and the main subjects for an extended analysis concern capacity and incapacity to make a will, the validity and formal requisites of wills, what constitutes revocation, revival and republication, and the general principles to be applied in testamentary construction.

<sup>1</sup> 24 Pick. 136; *Loveren v. Lamprey*, 2 Fost. 434; *McNaughton v. McNaughton*, 34 N. Y. 201; *Nichols v. Allen*, 87 Tenn. 131, 9 S. W. 430; *Laughlin v. Norcross*, 53 A. 834, 97 Me. 33 (insurance policy taken out after will); *Kennaday v. Sinnott*, 21 S. W. 233, 179 U. S. 606, 38 L. Ed. 339.

<sup>2</sup> It followed that, unlike a bequest of personal property, after-acquired lands would not pass. 1 P. Wms. 575; *Minuse v. Cox*, 5 Johns. Ch. 551; *Hays v. Jackson*, 6 Mass. 149; *Stimson's Am. Stat. Law*, § 2634; *Girard v. City of Philadelphia*, 4 Rawle, 323, 26 Am. Dec. 145. If a mortgagee of land who made a will, afterwards foreclosed or perfected his title by taking an absolute deed of the premises, a new will or codicil became needful. *Brigham v. Winchester*, 1 Met. 390; 5 Pick. 112, 16 Am. Dec. 377.

<sup>3</sup> The governing test thus becomes one of the testator's actual intention, as shown by the will. *Kimball v. Ellison*, 128 Mass. 41; 55 Conn. 223; *Decker v. Decker*, 121 Ill. 341, 12 N. E. 750; *Hardenbergh v. Ray*, 151 U. S. 112, 38 L. Ed. 93; 90 P. 810; *Tarrant v. Core*, 56 S. E. 228, 106 Va. 161; *Williams v. Brice*, 51 A. 376, 201 Penn. 505; *Dearing v. Selvey*, 40 S. E. 478, 50 W. Va. 4.

<sup>4</sup> Statute 1 Vict. c. 26, § 3, operating on English wills made since 1837.

## PART II.

## CAPACITY AND INCAPACITY TO MAKE A WILL.

## CHAPTER I.

## TESTAMENTARY CAPACITY IN GENERAL.

31. As a rule, any person of sound mind, who has reached the age of discretion, and is under no constraint of will, may be pronounced capable of making a testamentary disposition of his property conformably to the prescribed forms of law.<sup>1</sup> Whatever exceptions exist will appear in the course of the discussion upon which we now enter; and those not consistent with the maxim itself we confine to the present chapter.

32. Whether one's disposition relates to real or to personal property, or embraces both kinds, the rule of testamentary capacity is the same. If the testator at the time of making the disposition has the sound mind and free will requisite, the law is satisfied, whatever species of property that disposition may include; otherwise it is not satisfied.<sup>2</sup>

33. Crime has been considered an exception to the rule of testamentary capacity in various instances. Indeed, the old common law with great severity inflicted the penalty of incapacity upon many classes of so-called guilty persons; not so much to humiliate them, we may suppose, as for enabling the Crown the more surely to seize upon their property and utterly confiscate it.<sup>3</sup>

<sup>1</sup> Cf. Swinb. pt. 2, § 1.

<sup>2</sup> 6 Co. 23; *Sloan v. Maxwell*, 2 Green Ch. 563, 566. It is said in 6 Co. 23: "If he were of sane memory at the time of making the testament of the goods, he could not be of non-sane memory at the time of the making of the will of the lands, both being made at one and the same instant."

There is reason, however, for holding that one of weak or failing intellect might grasp in his mind and memory the arithmetic of a simple and small estate where that of a vast and complex one would tax him too severely; which distinction, as applied to the credit or discredit of the testament, involves properly a consideration of the individual's business habits and experience while in his normal condition. 1 Dem. (N. Y.) 503, 511.

<sup>3</sup> Swinburne enumerated among those who were thus legally disqualified in his day, slaves, villeins, captives, prisoners, traitors, felons, heretics, apostates, manifest usurers, incestuous persons, libellers, suicides, outlawed persons, those excommunicated and prodigals: a promiscuous list in which wrong-doers, unfortunates, and those

All this learning concerning the criminal disability to make a will is of little practical consequence in the United States.<sup>1</sup>

34. **The case of aliens supplies another instance of legal incapacity** which the old law maintained more zealously than the enlightened policy of our present day commends. Alien enemies and alien friends are here to be distinguished. Alien enemies seem affected, for the time being, with a sort of criminal taint, or, at all events, the law of nations has thought fit to harass them in case of war with the government to which they owe allegiance; and hence the maxim which denounces persons of this class as incapable, without sovereign license of the hostile jurisdiction, to make any testamentary disposition of their property or even to reside or do business there. Alien friends, however, or aliens whose country is at peace with the jurisdiction in question, have by the English common law, which is adopted with local variations in most of the American States, been treated as incompetent to devise real estate, or, indeed, to hold it at all.<sup>2</sup> But they may dispose of their personal estate at pleasure.<sup>3</sup>

35. **An alien friend's devise of land is regarded, nevertheless, as voidable** by the government rather than absolutely void. The

of courageous conscience are found unhappily blended. Swinb. pt. 3, § 7; 1 Redf. Wills, 119; 2 Bl. Com. 499. Scarcely any of these disqualifications now exist in instances of conviction, and legislation provides for a beneficial administration of the convict's property instead. See Stat. 33 and 34 Vict. c. 23 (1870); 1 Jarm. Wills, 43-45; *Bateman's Trust, Re*, L. R. 15 Eq. 355; *Norris v. Chambres*, 29 Beav. 258. Forfeiture consequent upon outlawry appears, in fine, to be the last remnant of the ancient criminal disqualification. Outlawry, by the old law, produced an incapacity during the time one remained an outlaw; but with reference, it would appear, to goods and chattels rather than lands, and not without some subtle distinctions in the guilty person's favor. See 2 Bl. Com. 499; Swinb. pt. 2, § 21; 1 Jarm. 43.

<sup>1</sup> Forfeiture of estate beyond the life of the person attainted and corruption of blood are condemned expressly by the Constitution of the United States and in the jurisprudence of most States, even in the extreme but uncertain crime of treason; while under some of our local codes the power of forfeiture is wholly denied to the State. 2 Kent Com. 385, 386; U. S. Constitution, Art. III., § 3. In Kentucky a person under sentence of death may make his will; and there is no reason to doubt that the same rule obtains throughout the United States. *Rankin v. Rankin*, 6 Monr. 531, 17 Am. Dec. 161.

<sup>2</sup> Bac. Abr. Wills, B. 17; 1 Wms. Exrs. 13; Co. Lit. 2 b; 1 Wms. Exrs. 12.

<sup>3</sup> For as Lord Chancellor Cottenham has observed, "The incapacity of aliens to hold land is founded upon political and feudal reasons which do not apply to money." *Du Hourmelin v. Sheldon*, 1 Beav. 79: s. c., 4 My. & Cr. 525. Hence an alien's purchase of real estate is not protected for his own benefit; not even though he should take the conveyance in the name of a trustee, leaving a vested interest in the land to himself; and yet if the trust created were to give him simply a beneficial interest in the pecuniary proceeds arising from a sale of land, the courts would protect it as valid. 1 Beav. 79; 4 My. & Cr. 525. And pursuing this distinction, an alien may, as we find, be made a legatee, though not a devisee, where a conversion of real estate into money has given rise to the fund. *Craig v. Leslie*, 3 Wheat, 563, 4 L. Ed. 460; *Anstice v. Brown*, 6 Paige, 448; And see *supra*, 23.



Crown became entitled to the real estate after office found; and this whether the alien himself was enjoying the property during life, or his devisee after death; so that it was fair to assert that a title, though a defeasible one, vested in the one case or the other. The situation was harder where the alien died without having willed the land away; for then, it escheated to the sovereign without office found, on the fiction that an alien can have no heirs.<sup>1</sup> Such was the doctrine long upheld in England; and such, too, is the announcement of the law in our American States, independently of legislation to the contrary.<sup>2</sup>

36. **These disabilities of aliens appear to have been substantially abolished** in favor of a policy whose aim it is to protect equally the acquisitions of natives and foreigners; so that by British statute (1870) an alien is now empowered to take, acquire, hold and dispose of real and personal property of every description, in the same manner as a natural-born subject.<sup>3</sup> Earlier legislation removing wholly or in part, or upon compliance with formalities, the disabilities of aliens to take, hold, or transmit estate, real as well as personal, may be found in most of the American States. And provisions thus modifying in a liberal direction the disabilities of aliens are embodied in some of our more recent State constitutions.<sup>4</sup>

<sup>1</sup> Co. Litt. 2 b; 1 Jarm. Wills, 41; 6 Johns, Ch. 360; *Montgomery v. Dorion*, 7 N. H. 475.

<sup>2</sup> In other words, an alien might take real estate by deed, or devise, or other act of purchase, but he could not hold against the State; his estate, therefore, was defeasible, good against all but the State, and good against the State until proceedings instituted by inquest of office on its behalf had been carried to judgment. *Wilbur v. Tobey*, 16 Pick. 179; *Waugh v. Riley*, 8 Met. 295. And this disability of aliens to hold real estate extends, *pari passu*, in principle to their devise of such real estate and the devolution of title therein to the devisee. 2 Kent Com. 53, 69; 5 Call, 364. But an alien could not take land by descent, because the law would not cast the descent upon one who could not by law hold the estate. *Fairfax v. Hunter*, 7 Cr. 603; *Craig v. Leslie*, 3 Wheat. 563, 4 L. Ed. 460; *Piott v. Commonwealth*, 12 Gratt. 564; *Jackson v. Adams*, 7 Wend. 367; *Rubeck v. Gardner*, 7 Watts, 455; *Ramires v. Kent*, 2 Cal. 558. See *Reese v. Waters*, 4 W. & S. 145; *Foss v. Crisp*, 20 Pick. 121 (tenant by curtesy).

<sup>3</sup> Act 33 Vict. c. 14, § 2 (1870). The language of this act is not confined to alien friends, nor does it distinguish in terms between aliens resident in England or non-residents. 1 Jarm. Wills, 41, comparing 7 and 8 Vict. c. 66, § 3.

<sup>4</sup> These changes need not be here expounded in detail; but their policy favors leaving titles in land undisturbed on account of the alienage of any former owner, so that the State may be no longer the subverter in effect, but the protector of such acquisitions. Yet, dictated though these civil privileges often are by a just and liberal policy, they must be taken to be strictly local; and until a foreigner is duly naturalized, in accordance with the Act of Congress, he is not entitled in any State to other privileges than those which the laws of that State allow to aliens. 2 Kent Com. 70, 71; *Lumb v. Jenkins*, 100 Mass. 527. Those privileges and immunities of citizens in the several States which our federal constitution accords applies only to natural-born or duly naturalized citizens.

37. **Whether the reigning sovereign can make a will** is of some consequence in Great Britain, though immaterial in this country. The property which belongs to himself and not to the State or his people, he ought on principle to be capable of transmitting by his testament, but not Crown lands or moneys appropriated to the public service.<sup>1</sup>

38. **Seamen and soldiers are treated with peculiar indulgence in our law**, as a class of persons not only entitled to the public gratitude, but requiring in a measure public protection against their own improvidence and the wiles to which they are exposed.<sup>2</sup>

<sup>1</sup> A statute of George III recognizes this distinction. But as earlier jurists of the realm dreaded to touch the delicate inquiry what things a sovereign might transmit by will as his own, so have the English spiritual courts positively disclaimed all jurisdiction to regulate the settlement of a royal estate, or even to admit a royal will to probate. *Goods of Geo III*, 3 Sw. & Tr. 199; 1 Add. 262. And see *Godolph.* pt. 1, c. 7, § 4.

<sup>2</sup> Hence we find various provisions in English, if not American, statutes, which the courts of probate jurisdiction interpret as rendering the wills of seamen void when made by way of security for debt; a security of which the creditor takes the greater advantage, knowing that his debtor may die suddenly when far away, and so imposing a sort of duress to obtain it. 1 Wms. Exrs. 51, 52; *Zacharias v Collis*, 3 Phillim. 190. The equity of such statutes does not, however, extend beyond the classes specified. 2 Cas. temp. Lee 87; 1 Wms Exrs. 52.

## CHAPTER II.

## INCAPACITY OF INFANTS.

39. **The incapacity of infants to make a will is founded in their indiscretion; and the policy of declaring them under a disability in this respect is sound.** For if incapable at law of making a binding transfer of what he owns to take effect while alive and before reaching majority, still less should an infant be thought a suitable person to regulate by a comprehensive act which he does not live to recall at full age the disposition of his whole estate at his death; thereby preventing the State's equal scheme of distribution from operating, by an assertion of will which sinister influences, artfully surrounding him, may in reality have produced, rather than his own free and rational choice.

40. **Our earlier rule was more favorable to the infant's right of testamentary disposition** than that which prevails in England and America at the present day. Indeed, the doctrine of the Roman civil law, to which the English ecclesiastical courts gave assent, was, that infants at the age of fourteen, if males, and twelve, if females, might make wills of their personal property.<sup>1</sup>

41. **From this doctrine of testamentary capacity, during the latter years of one's minority, with regard to personal property, flowed certain consequences detailed by the older books.** In computing the legal age of a person, whether for determining majority or otherwise, the day of birth should be included; hence, as fractions of a day are not reckoned, the testament of an infant born February 1, 1700, would be good in case of a male, under the rule of

<sup>1</sup> Nor did our canonists stand alone in granting such permission; for common lawyers maintained the justice of allowing wills made at that early stage of life, the king's bench refused prohibitions when applied for to restrain the spiritual courts from passing such instruments to probate, and in various instances the practice received the express sanction of courts of chancery. Swinb. pt. 2, § 2; Godolph. pt. 6, c. 8, § 8; *Deane v. Littlefield*, 1 Pick. 239; 2 Bl. Com. 497; 2 Mod. 315; Gūb. Eq. Rep. 74; *Holyland, Ex parte*, 11 Ves. 11. But the old books make some contradictory assertions on this subject. Co. Lit. 89 b, note by Hargrave; 2 Bl. Com. 497, Christian's note. The age of permission thus accorded was the same substantially, as that which invested the infant with a right to consider his guardianship for nurture ended, and to elect, or at all events nominate, a guardian for himself. Schoul. Dom. Rel., §§ 285, 289. See 1 Jarm Wills, 33.

From Statute of Wills 32 and 34 Henry VIII, infants under the age of twenty-one were expressly excepted. 2 Bl. Com. 374, 375. And prior to that statute, not even an adult subject could be pronounced capable, under the English law, of making a devise of land from the days of William the Conqueror. The infant's will was confined to personal property.

capacity we are considering, though made January 31, 1714; or, in case of a female, though made January 31, 1712.<sup>1</sup> The will of course would operate as a valid disposition of chattels without and even against the consent of parent or guardian.<sup>2</sup> Likewise, the infant's express approval or ratification of a will made earlier and during the period of nurture would establish it as strong and effectual, if given after accomplishing this age of testamentary capacity.<sup>3</sup>

42. **Where the testator was not of sufficient discretion in fact,** that would overthrow the testament, as Blackstone says, whether his age were fourteen or four and twenty.<sup>4</sup> Nor would mental unfitness alone be a natural objection to so young a person's will, but the undue constraint and influence besides, which adults seeking to regulate his disposition might exert upon him.<sup>5</sup>

43. **Modern legislation repudiates largely the wills of all infants, male or female,** with obvious disfavor. Thus, the English statute 1 Vict. c. 26, expressly declares that "no will made by any person under the age of twenty-one years shall be valid."<sup>6</sup> And the latest enactments of a majority of American States are to the same purport, establishing the age of twenty-one as that at which a person of either sex ceases to be disqualified from making a will either of real or personal estate.<sup>7</sup>

<sup>1</sup> 6 Mod. 259; Schoul. Dom. Rel., § 391; 2 Kent Com. 233; 1 Bl. Com. 463; 3 Haring, 557; Grant v. Grant, 4 Y. & C. 256. See pertinent comment upon such a rule in 1 Redf. Wills, 20, 21. The popular celebration of one's birthday anniversary or the anniversary of a person's death reckons differently.

<sup>2</sup> Swinb. pt. 2, § 2, pl. 6; Bac. Abr. Wills, B. 1.

<sup>3</sup> 1 Sid. 162; Swinb. pt. 2, § 2, pl. 7; Schoul. Dom. Rel., §§ 432-448. This indulgence of a ratification at all transcends the bounds of good sense; and the better principle, under statutes which insist upon written wills and a formal execution, is that a will made during the age of incapacity can only be rendered valid at one's capable age by a republication with all the usual formalities. *Post*, Part IV, c. 3.

<sup>4</sup> 2 Bl. Com. 497; Deane v. Littlefield, 1 Pick. 243.

<sup>5</sup> Notwithstanding all this, the will of a school-boy only sixteen years old in favor of his schoolmaster was admitted to probate in the English ecclesiastical courts a century and a half ago, where no evidence of fraud or undue influence or constraint appeared. *Arnold v. Earle*, Cas. temp. Lee, 529 (June 5, 1758).

<sup>6</sup> See 1 Vict. c. 26, § 7 (1837).

<sup>7</sup> States still vary in provisions, however, concerning the testamentary capacity of infants. Eighteen years is sometimes taken as the testamentary age for both males and females; while various codes adopt a still earlier standard of discretion, distinguishing in some instances between males and females, or even between females married and unmarried. Sometimes, too, the line is drawn between the kinds of property, so that an infant's personalty but not his real estate may be disposed of by testament before he reaches the age of twenty-one; an antiquated distinction, it would seem, when the immense modern expansion of wealth in personalty is considered. See 4 Kent Com. 506; 41 S. E. 816, 64 S. C. 97. Scarcely any American cases of consequence have arisen on this subject. See *Moore v. Moore*, 23 Tex. 637; 7 Lea. 240; *Seiter v. Straub*, 1 Dem. (N. Y.) 264 (undue influence); 47 Hun. 109; 64 Conn. 344, 30 A. 55. And see *Banks v. Sherrod*, 52 Ala. 267.

**44 The policy of permitting an infant to create a testamentary guardianship** has changed correspondingly within the last two hundred years.<sup>1</sup>

<sup>1</sup> Under Stat. 12 Car. II, c. 24, which instituted testamentary guardianship, any father, whether infant or adult, might by last will or testament dispose of the custody and tuition of his child, so as to carry over the entire management of that child's property, during its minority or for any less period prescribed. Schoul. Dom. Rel., § 287. But since the statute of 1 Vict. c. 26, an infant father cannot at English law create a testamentary guardianship at all. Ib.

## CHAPTER III.

## INCAPACITY OF MARRIED WOMEN.

45. **The incapacity of married women to make wills has its root** in our common-law principle of coverture, by which husband and wife were treated as one person in such a sense that the woman took her place under the cover or protection of her lord; her rights not less than her obligations becoming suspended, for the better harmony and peace of the marriage state, while the husband exercised an undisputed sway as head of his household.<sup>1</sup> With the property brought into the marriage state unequally parcelled out by the common law, and a surviving husband entitled, moreover, to administer upon the estate of his deceased wife for his own benefit and recover her outstanding personal property to his own use and enjoyment, it is not strange that we find the female spouse laid under disability as to making her own will.<sup>2</sup>

46. **So, too, the marriage of a *feme sole* caused the revocation** of any will she might have executed while single; while marriage had *ipso facto* no such summary operation upon a man's will.<sup>3</sup>

47. **Maxims of equity, together with the married women's legislation since 1848** have, however, made immense inroad into this early doctrine of the wife's incapacity for testamentary disposition; so that we find the female spouse, in these days, not only permitted to make her will, with considerable freedom, but relieved almost wholly of the old disabilities which the doctrine of coverture imposed upon her.

<sup>1</sup> Schoul. Hus. & Wife, §§ 54, 86; 1 Bl. Com. 442-445; 2 Kent Com. 130-143; Schoul. Dom. Rel. Part II, cs. 15, 16.

<sup>2</sup> The law itself regulated the descent of her real estate, excepting her expressly from the Statute of Wills, 34 and 35 Hen. VIII, c. 5; and as to her goods and chattels, her personalty, any will she might be declared capable of making, would necessarily be in derogation of the rights of her surviving husband. A married woman, therefore, could not make a valid will. Her incapacity in this respect was not founded in contempt of her discretion; nor, save, perhaps, for the subtle marital influence which husbands of strong character are known to exert, in any legal denial of a capacity to exercise free will; but rather because of these disabilities of coverture which general policy imposed and in order that the husband's marital control of her property and right of succession might be preserved unimpaired. As maid or widow, any woman who had turned her majority was as free to dispose of property by a testament as man himself. "The disability of coverture differs materially from that of infancy, idiocy, or lunacy. It does not arise from natural infirmity, but is the creature of civil policy." It may consequently be dispensed with in various instances; unlike the other disabilities referred to. 1 Jarm. 38

<sup>3</sup> See *post* §§ 424-426

48. Among early exceptions to such testamentary incapacity, the wife may make a valid will of personal property, with the consent of her husband. But this is upon the condition that he survives her, and does not elect, after her death, to disaffirm his consent already given. The will of a married woman, when presented for probate, is treated on the face of it as a mere nullity.<sup>1</sup> But where it is alleged to have been made with the assent of the husband, the court assumes jurisdiction. Hence the wife's right in such cases is founded upon the husband's gift or permission, or, as it is said, the waiver of his own right to administer for his own benefit.<sup>2</sup> And if the husband dies before his wife, her will is void so far as it could have derived any validity from his consent, and fails to operate against her next of kin.<sup>3</sup>

49. The American rule is that the husband may allow his wife to make a valid will of her personal estate, though not perhaps of her lands, and that his assent cannot be revoked after due probate of the will.<sup>4</sup> And, as in English law, such a will may operate,

<sup>1</sup> *Tucker v. Inman*, 4 M. & G. 1076; *Fane, Ex parte*, 16 Sim. 406.

<sup>2</sup> *Stevens v. Bagwell*, 15 Ves. 156; *Smith, Goods of*, 1 Sw. & Tr. 127.

<sup>3</sup> *Ib.* And see *Willock v. Noble*, L. R. 7 H. L. 580, 597.

This exception of a husband's assent is one which chancery and probate courts have asserted, without seeking the aid of any favorable legislation on this point. And the "license" in question is so nearly a gift of his own property that in order to give it effect the husband must have assented to the particular will which the wife has made. His general assent that she may make a will is not deemed sufficient. *Rex v. Bettesworth*, 2 Stra. 891; 1 Wms. Exrs. 54; 2 Bl. Com. 498. Nor can he be said to give his assent while ignorant of the contents of the will, and unable to ascertain them. *Willock v. Noble, supra*. And the time when this assent on his part shall make the particular will effectual or be withheld so as to defeat it is taken to be, not while the wife was living but after her death, and in fact when the will is offered for probate and the self-sacrifice on his part would be unequivocal. He may therefore revoke an assent given by him to the wife herself at any time while coverture lasts or after her death before probate. *Swinb. pt. 2, § 9*; *Schoul. Hus. & Wife, § 458*.

But the assent thus requisite on the husband's part may be inferred from circumstances subsequent to the coverture. And if after his wife's decease he acts upon the will or once agrees to it, he is not considered at liberty to retract his assent afterwards, and oppose the probate. 2 Mod. 170; 10 Jur. 417; 1 Rob. Ecc. 364. Where the husband is named executor and he proves the will generally, his assent will be inferred. *Fane, Ex parte*, 16 Sim. 406. And see (1901) 1 Ch. 424. Such acts even, as expressing gratification at his wife's selection of an executor, or recommending him to particular places to procure suitable preparations for the burial, may constitute a conclusive presumption of assent after the wife's death; at least, if the executor has been thereby induced to act under the instrument. 1 Redf. Wills, 24; 1 Mod. 211; 2 Mod. 170. So, too, it has been decided that the husband cannot withdraw his assent before probate, after giving the sole legatee a written memorandum sanctioning the will. *Maas v. Sheffield*, 10 Jur. 417; 1 Rob. Ecc. 364.

In general the probate of a will is conclusive, both of the capacity of the testator, being a *feme covert*, to make the will, and of the husband's consent.

<sup>4</sup> See local statutes; *Wagner v. Ellis*, 7 Penn. St. 413, 47 Am. Dec. 515; *Fisher v. Kimball*, 17 Vt. 323; *Emery v. Neighbor*, 2 Halst. 142; 76 S. W. 542, 25 Ky. Law 869; *Lee v. Bennett*, 31 Miss. 119; *Newlin v. Freeman*, 1 Ired. Law, 514.

by way of gift from the husband, so as to deprive him of the right to administer on the wife's estate for his own benefit, or so as to vest her personal property of the corporeal or incorporeal sort in others, which otherwise would have been his own, or so as to enable some other person to settle the estate as her executor.<sup>1</sup>

50. **So, too, where the wife holds as executrix** and her will is confined to property she takes in that character, she may make a will without her husband's assent, and the court of probate assumes jurisdiction.<sup>2</sup> Since this exception does not concern property to which the wife takes a beneficial title, it can hardly be called an exception at all. For the effect of such an instrument is merely to pass, by a pure right of representation, to the testator or prior owner, such of his personal assets as remain outstanding.<sup>3</sup> The married woman, in other words, has as executrix power to make a will which appoints an executor for the purpose of continuing representation to the original testator.<sup>4</sup>

51. **Where, again, property is given or settled to the wife's separate use**, or is agreed to be so given or settled, an exception arises in her favor. In such a case, and with reference more especially to things personal, the wife has long been permitted to dispose of such property to the full extent of her interest, although no particular form be prescribed in the instrument creating the trust. This follows as an incident to the right of beneficial enjoyment; it makes her right of disposition complete.<sup>5</sup> And it may

<sup>1</sup> The husband's general assent to make a will does not suffice, but must attach to the particular testamentary disposition which she may have made. *Kurtz v. Saylor*, 20 Penn. St. 205; *George v. Bussing*, 15 B. Mon. 558; *Cutter v. Butler*, 25 N. H. 357, 57 Am. Dec. 330. This assent should be given at the time the will is proved; and there is authority for the assertion that the husband may withdraw his assent at any time before probate. See *Wagner's Estate*, 2 Ashm. 448; *Van Winkle v. Schoonmaker*, 15 N. J. Ch. 384. Cf. *Cutter v. Butler*, *supra*; *Grimke v. Grimke*, 2 Desaus. 66; 7 Penn. St. 413, 47 Am. Dec. 515. The will should be presented for probate; and the decree of the probate court establishing the will of the married woman concludes its validity and her right to make it. 11 Cush. 519; *Ward v. Glenn*, 9 Rich. 127; *Cutter v. Butler*, 25 N. H. 357, 57 Am. Dec. 330; *Lee v. Bennett*, 31 Miss. 119.

Where local legislation provides an effectual assent to the wife's will in some other mode, as by the husband's writing, once and for all, or imposes some other variation of the doctrine above stated, exceptions of judicial statement of course occur. See 105 Mass. 228. This coverture doctrine of a will by the wife with her husband's license or assent is now dispensed with, wholly or partially, in the codes of various States, as we shall see presently.

<sup>2</sup> *Tucker v. Inman*, 4 M. & G. 1076. Otherwise where the husband's full marital right had attached to the property. 2 East 552; *Cutter v. Butler*, 25 N. H. 353, 57 Am. Dec. 330.

<sup>3</sup> *Hodsdon v. Lloyd*, 2 Bro. C. C. 534.

<sup>4</sup> *Willock v. Noble*, L. R. 7 H. L. 580, 590, *per* Lord Chancellor Cairns.

<sup>5</sup> *Fettiplace v. Gorges*, 1 Ves. Jr. 46; s. c., 3 Bro. C. C. 8; 9 Ves. 375.



be affirmed, as a general principle, that personal property which has been acquired by a married woman under such circumstances that it became her separate estate may, independently of legislation which regulates the subject differently, or of express restraints, be dealt with by her as if she were a single woman.<sup>1</sup>

52. Restraining legislation or a restraint upon the separate property must operate; and hence the clause "against anticipation," so called, which in English settlements of this kind often ties up the wife's hands and prevents her from alienating or incumbering the separate property during coverture, excludes her right as a married woman to alienate it by will.<sup>2</sup>

53. Even where husband and wife live apart, covenants under a separation deed for the wife's benefit are now upheld as not obnoxious to sound policy. Whatever the wife acquires and holds for her sole and exclusive use and enjoyment under such a deed may accordingly pass by her will as though she had no husband.<sup>3</sup>

<sup>1</sup> 1 Sw. & Tr. 48, 125; Crofts's Goods, L. R. 2 P. & D. 18. As to what shall constitute such separate property, see Schoul. Dom. Rel., Part II, cs. 8, 9.

There is no reason for distinguishing between real and personal estate settled to the wife's separate use, save so far as the old statutes of disability to devise may be found to operate against married women. The English cases for some time manifested a doubt on this point, and the testamentary *jus disponendi* was thought not so clear in the case of separate real estate as of separate personalty. But the rule of chancery is now well settled that a married woman may pass her separate real estate by will as a *feme sole*, not less than her personal property. *Taylor v. Meads*, 4 De G. J. & S. 597; 5 Giff. 64; *Pride v. Bubb*, L. R. 7 Ch. 64. Such a will defeats the husband's equitable right to curtesy. *Cooper v. Macdonald*, 7 Ch. D. 288.

The English practice is to grant a limited probate of the wife's will so as to operate upon the separate property disposed of. See Crofts, Goods of, L. R. 2 P. & D. 18.

<sup>2</sup> See Schoul. Dom. Rel., § 110; L. R. 2 Eq. 534.

On the other hand, as this doctrine of a separate use extends to settlements antenuptial or (if founded upon a consideration) postnuptial, we may conclude that the will of a married woman may upon property settled thus without restriction operate as incidental to her right of alienating and disposing of it and without any express clause empowering her. 1 Jarm. Wills, 39. And the will permitting her testamentary disposition of her separate property prevails, whether such property be in possession or reversion, whether vested in present interest or in expectancy. *Bishop v. Wall*, 3 Ch. D. 394; *Lechmere v. Broderidge*, 32 Beav. 353; *Willock v. Noble*, L. R. 7 H. L. 580. And where she may thus dispose of the principal of the fund she may dispose of income, savings and accretions as well. *Brooke v. Brooke*, 25 Beav. 342; 17 Beav. 578. Separate earnings and the profits and stock in trade of a separate business carried on by the wife may carry all the incidents of separate property. *Ashworth v. Outram*, 5 Ch. D. 923; 1 Sw. & Tr. 125; Schoul. Dom. Rel. Part II, c. 12. See *Baddeley v. Baddeley*, 9 Ch. D. 113.

Moreover, the wife's will of separate property being a good one during coverture, the will continues good when coverture ends, whether wife or husband be the survivor. *Bishop v. Wall*, 3 Ch. D. 194.

<sup>3</sup> *Pride v. Bubb*, L. R. 7 Ch. 64. See as to her savings, *Brooke v. Brooke*, 25 Beav. 342; *Tharp, Re*, 3 P. D. 76. As to her earnings, see *Haddon v. Fladgate*, 1 Sw. & Tr. 48.

The English divorce act, 1857, recognizes the will of a married woman as to property acquired by her after a protection order, as for her husband's desertion. *Worman*, Goods of, 1 Sw. & Tr. 513; 1 Wms. Exrs. 60.

The wife's capacity as in effect that of a single woman becomes thus extended from the old hypothesis of the husband's civil death. Wherever her husband is dead at the law, a married woman may make a will; as where he has been banished for life, or is transported for life; or is an alien enemy.<sup>1</sup> For in such cases the wife is no longer regarded as under the disabilities of coverture.<sup>2</sup>

54. **In America the wife's disposal of her equitable separate property** follows a similar doctrine; and it is ruled in several States that a married woman, when not restrained from alienation, may, as incidental to her separate estate, and without any express power, dispose of it by instrument *inter vivos* or will.<sup>3</sup> But the principle is by no means so universally nor so boldly sustained by our chancery courts as in those of England; and inasmuch as "separate property" is of statutory rather than equitable origin from our American point of view, local statutes in point are constantly found touching the wife's will and her testamentary capacity.

55. **Under the latest English legislation**, the will of a married woman is admissible in probate without exception or limitation.<sup>4</sup>

56. **In this country the great revolution effected in the property rights of married women** leaves its traces upon their testamentary privileges. Local statutes, not those alone which recognize or create a separate property in the wife, or turn her whole general property into separate property, but those relating explicitly to the wills of married women, are to be found in perhaps every State in this Union; and to keep pace with public policy, one must study the latest local enactments on this subject.<sup>5</sup>

<sup>1</sup> 2 Vern. 104; Compton v. Collinson, 2 Bro. C. C. 377; Newsome v. Bowyer, 3 P. Wms. 37; 15 Jur. 686; 23 L. J. Ch. 776; 1 Salk. 116.

<sup>2</sup> See 1 Jarm. Wills, 40.

<sup>3</sup> 2 Kent Com. 170, 171; Porcher v. Daniel, 13 Rich. 349; Buchanan v. Turner, 26 Md. 1; 25 N. H. 343, 57 Am. Dec. 330; 18 Ala. 408; 3 Johns. Ch. 523; Holman v. Perry, 4 Met. 492; Emery v. Neighbor, 2 Halst. 142.

<sup>4</sup> This is a great advance upon the rule as cautiously prescribed in 1 Vict. c. 26, § 8. See Smart v. Tranter, 40 Ch. D. 165; 11 P. D. 169; 12 P. D. 137.

<sup>5</sup> See Stimson's Am. Stat. Law, § 6460. Differences will be observed by minute comparison of these codes. On the whole, the principles thus stated or indicated, as embodying what we may call an American policy, though not uniformly expressed in clear and unambiguous language, are that the wife, if of full age and sound mind, may devise or bequeath, by her sole will, whatever separate property, at least, the statutes secure to her; and that such will shall be valid without the joinder or assent of her husband. See 36 S. C. 428. But power to cut off the husband by her sole will is restricted in some States. See *supra*, 19; Tyler v. Wheeler, 160 Mass. 206, 35 N. E. 666. The restriction, often applied to the wills of either spouse, is a corresponding one. "Privy examination" of the wife, as in her deed of land, does not here apply. 70 S. W. 610, 109 Tenn. 148. The latest legislation on the subject (much of which bears date in the several States not earlier than 1873) has a tendency to confer independent testamentary powers upon the wife without qualification of terms as to her property

57. This whole subject has as yet received but little attention in the courts, though much from the legislature.<sup>1</sup>

58. By the Roman civil law, a married woman possessed the same testamentary capacity in all respects as a *feme sole*.<sup>2</sup> And such is the law in France, Holland, Spain, and the European countries generally.<sup>3</sup> In Scotland the wife is permitted to bequeath her share of the common goods, even without the husband's assent.<sup>4</sup>

and apart from her husband's concurrence. See *Schull v. Murray*, 32 Md. 9; 19 Md. 72, 81 Am. Dec. 626; *Stoutenburgh v. Hopkins*, 45 N. J. Eq. 890, 19 A. 622; *Knox's Estate*, 131 Penn. St. 220, 17 Am. St. Rep. 898, 6 L. R. A. 353; 18 A. 1021.

Property which was not really the wife's in her own right, but the husband's, at the time of her death, cannot, of course, be the subject of her devise or bequest; *Alsop v. McArthur*, 76 Ill. 20; 26 N. J. Eq. 160; nor that which vests at once in him upon her death, by the rule of survivorship. *Stroud v. Connelly*, 33 Gratt. 217. But the husband's joinder or other expression of assent should make his wife's will valid and conclusive both against him and his creditors. 26 N. J. Eq. 372; 81 Penn. St. 303.

<sup>1</sup> See *Caldwell v. Renfrew*, 33 Vt. 213; 27 Vt. 765; *Compton v. Pierson*, 28 N. J. Eq. 229 (strict construction); *Johnson v. Sharp*, 4 Cold. 45; *Hickman v. Brown*, 88 Ky. 377, 11 S. W. 199; 98 Tenn. 535, 41 S. W. 993.

There are already some decisions sustaining the wife's right to devise or dispose by her will, duly executed, of real estate held to her sole and separate use; not to add, of her general lands, as well as of personal property. *Albrecht v. Pell*, 18 N. Y. S. 127; *Emmert v. Hays*, 89 Ill. 1. And she may even, in certain States, cut off her husband's right of curtesy by observing the statute formalities of execution. *Sanborn v. Batchelder*, 51 N. H. 426; *Silsby v. Bullock*, 10 Allen, 94; *McBride's Estate*, 81 Penn. St. 393; 132 Penn. St. 533; 27 N. J. Eq. 293. Cf. *Pool v. Blakie*, 53 Ill. 495. And see *Cavanaugh v. Ainchbacker*, 36 Ga. 500, 91 Am. Dec. 778; *Stewart v. Ross*, 50 Miss. 776. And in respect to curtesy and bequests in lieu thereof, the husband may, in some States, be put to his election, as the widow has been in respect of her dower. *Clarke's Appeal*, 79 Penn. St. 376, 19 A. 274; *Huston v. Cone*, 24 Ohio St. 11. For the statute rights of a husband under a devise by his wife without his consent, see 152 Mass. 414, 25 N. E. 611.

<sup>2</sup> 2 Bl. Com. 497.

<sup>3</sup> 4 Burge Col. & For. Laws, 326.

<sup>4</sup> *Ib.* 328. The early policy of England as to the wills of married women seems in truth peculiar to that country. For Voet and other publicists have declared that, although the wife should not be allowed to make a contract without the consent of her husband, yet she ought to be permitted to make a will, because it does not take effect until the marital authority has ceased. Voet, *Sande & Rodenb.* cited 4 Burge Col. & For. Laws, 326. We may understand, therefore, why the Louisiana Code permits the wife to make her testament without the authority of her husband. La. Code, art. 132. And in other Southwestern States, under the community system, the wife's right of testamentary disposition is likewise to be found. *Lee v. Bennett*, 31 Miss. 119. As to her holographic will, see 59 P. 556. In California the statute gives the wife power to dispose of all her separate estate without the concurrence of her husband, but her will must be attested, witnessed, and proven after the ordinary manner of wills. On our Southwestern and Pacific frontier, indeed, as a result of the mingled influence which first moulded these States, the civil and common law systems of jurisprudence are found today inseparably blended. And the obvious tendency at present in England and the United States is to emancipate the wife from her ancient disabilities in that respect; notwithstanding which the restriction seems a wise one, that neither spouse shall utterly deprive the other of the usual and legal distributive rights at a capricious discretion. *Ante* 19.

59. **The republication or re-execution of a wife's will** after her coverture has terminated is sometimes considered.<sup>1</sup> As to property of which the wife was intestate during coverture, re-execution or a new will is desirable.<sup>2</sup>

60. **Devises from the wife to her husband are not favored** by courts of equity. There are decisions to the effect that the husband cannot become the gainer, or have his marital rights extended, by his wife's testamentary disposition of her lands. But they turn often upon statutory construction rather than principle.<sup>3</sup> Wills of married women unduly obtained through the marital influence and authority of their husbands are of course invalid, though the case should fall within one of the exceptions to the wife's general incapacity.<sup>4</sup> So if a wife, having power to dispose of property by her will, makes her will, and afterwards destroys it by the compulsion of her husband, it may be established afterwards, on due proof of the compulsory destruction, and of its contents and execution.<sup>5</sup> The wife's will or appointment in favor of her husband may be revoked as in other cases.<sup>6</sup>

61. **Husband and wife sometimes agree formally** as to the disposition of certain property after decease.<sup>7</sup>

62. **Joint or mutual wills by husband and wife are recognized** in various jurisdictions.<sup>8</sup>

63. **As to the wife's gift *causa mortis***, the same principles which regulate the wife's testamentary disposition of her personal property should regulate such a gift likewise.<sup>9</sup> There appears no

<sup>1</sup> See as to republication by her, 1 Wms. Exrs 55; Willock v. Noble, L. R. 7 H. L. 580; Graham's Goods, L. R. 2 P. & D. 385; (1895) 2 Ch. 116; L. R. 1 P. & D. 277; Bilke v. Roper, 45 Ch. D. 632 (1890). And see *post*, Part IV, as to Republication.

<sup>2</sup> L. R. 7 H. L. 580; 2 East, 556. See Porter v. Ford, 82 Ky. 191.

<sup>3</sup> Morse v. Thompson, 4 Cush. 562; Wakefield v. Phelps, 37 N. H. 295; Hood v. Archer, 1 McCord, 225. And see 25 N. Y. 328. On the other hand, the wife's bequest of her *choses in action* to her husband has been upheld in more than one State. Caldwell v. Renfrew, 33 Vt. 213; Burton v. Holly, 18 Ala. 408.

<sup>4</sup> Marsh v. Tyrrell, 2 Hagg. 84; 2 Hagg. 179.

<sup>5</sup> 1 Wms. Exrs. 60. Cf. Nedby v. Nedby, 11 E. L. & Eq. 106.

<sup>6</sup> Eustace's Goods, L. R. 3 P. & D. 183.

<sup>7</sup> See Woodward v. Camp. 22 Conn. 457.

<sup>8</sup> Bower v. Daniel, 95 S. W. 347; 198 Mo. 289; Keith v. Miller, 174 Ill. 64, 51 N. E. 151. See *post*, Part V. As to wills executed together by husband and wife, where, each by mistake signs the other's will, see Alter's Appeal, 67 Penn. St. 341, 5 Am. Rep. 433 (legislature cannot rectify).

<sup>9</sup> See as to gifts *causa mortis* generally, 2 Schoul. Pers. Prop. §§ 135-198. It is held that the wife's gift of any of her several chattels during her last illness, and in expectation of death, is, like her will, valid on principle only by the assent of her husband. Jones v. Brown, 34 N. H. 439. See Kilby v. Godwin, 2 Del. Ch. 61. But cf. Marshall v. Berry, 13 Allen, 43 (effect of late legislation to the contrary). The

impolicy in making the husband the donee, wherever the wife's gift *causa mortis*, confined to personal property, is sustainable at all.<sup>1</sup> On the other hand, the husband may set up his antenuptial contract with his wife in reference to certain property, so as to prevent her gift *causa mortis* to others from taking effect to his prejudice.<sup>2</sup>

64. **Finally, a married woman may make a special testamentary disposition under a power**, even where her general testamentary capacity is by law denied or restricted. There are many decisions found to this effect, in England particularly.<sup>3</sup> A wife may have power to appoint certain property by will and not by deed, and *vice versa*.<sup>4</sup>

gift *causa mortis* as sanctioned in modern times is liable to the worst objections ever urged against the policy of informal wills; and it is highly desirable that such gifts be either restrained by legislation or discarded altogether. See 2 Schoul. Pers. Prop. §§ 197, 198.

<sup>1</sup> *Caldwell v. Renfrew*, 33 Vt. 213.

<sup>2</sup> *Lawrence v. Barrett*, 2 Allen, 36.

<sup>3</sup> 4 Kent Com. 506; 2 ib. 170, 171; 6 Cush. 497; 10 S. & R. 446; 2 Perry Trusts, § 668; *Dunn's Appeal*, 85 Penn. St. 94; 4 Sandf. 374; *Shattock v. Shattock*, L. R. 2 Eq. 182; 1 Phill. (N. C.) Eq. 101.

In cases of doubt, a limited probate of the instrument may be granted. L. R. 1 P. & D. 158, 319, 323.

<sup>4</sup> See L. R. 2 P. & D. 183; 28 W. R. 73; *Fane, Ex parte*, 16 Sim. 406.

Revocation and the other incidents of ordinary wills attend *pro tanto* the wife's testamentary disposition under a power; which, of course, may be so extensively conferred under the trust as to embrace a considerable property, and perhaps all, in fact, of her personal property. The same formalities are not necessarily requisite in executing a power, as in disposing of separate property; but rather the terms prescribed by that power should furnish the criterion. *Schley v. McCeney*, 36 Md. 266. This doctrine, however, is liable to local statute modification, founded in the general policy of prescribing a uniform mode of execution and attestation for all wills. Stat. 1 Vict. c. 26, § 10 (1837).

## CHAPTER IV.

## INCAPACITY OF INSANE PERSONS IN GENERAL.

64. Any will is void which is the offspring of an unsound mind; the broad principle of personal incapacity extending to all dispositions of property, all contracts, the entire management of one's own affairs. In an earlier English age the incapacity of insane persons to make a will was plainly, almost brutally, announced by our jurists, the common law drawing no fine line between persons *sui juris* and those *non compos*, which latter class of beings might be found huddled together in the vocabulary as madmen, lunatics, idiots, and natural fools.<sup>1</sup> At the present day the drift is in quite the opposite direction; the insane are humanely cared for, and much less than formerly is the malady found incurable. But what with symptoms increased and diversified greatly in the multitude of patients whose minds have given way under the prodigious strain of our modern social responsibility; what with the inventive zeal and complexity of all modern research; we now find the tests of mental incapacity running out into the most subtle of psychological refinements.<sup>2</sup>

<sup>1</sup> The disposition was to narrow the definition of the *non compos* (for "insanity" is a gentler word than our early progenitors were accustomed to apply to such unfortunates) and thus reduce the number of those whose kinsmen should feel the reproach of a malady which bore a moral infliction to the victim. Until the latter half of the eighteenth century asylums for hygienic treatment were scarcely known. The English madhouse was a pandemonium; scions of the rich and well born who had lost their reason were locked up in some distant corner of the mansion; while the common herd of lunatics and idiots were chained in cells or pens, or wandered, if harmless, as vagrants. In many of our American towns the selectmen would let them out to the lowest bidder to work for a scanty and miserable subsistence. The dramatist has depicted lunatic kings and beggars of our race as baring their breasts together to the howling storm and inviting the elements to aggravate their disorder; but it was not until George III gave insanity in real life the prestige of royal example that the disorder began to receive tender medical treatment, and the vulgar opinion that one who is *non compos* must remain so began to turn. See preface to 1 Wharton & Stillé, *Med. Jur.* 3d ed.; Swinb. pt. 2, § 4, pl. 3. Almost simultaneously (it is here added) the investigations of Pinel took place in Paris, which resulted in the separation from the common prison in that city of a distinct asylum for healment of the insane based on wise sanitary regulations. As to the treatment of the English maniac in the earlier days of the Georges, one need only turn over Hogarth's pictures in "The Rake's Progress."

<sup>2</sup> The influence of Rousseau's works (1760-1764) in converting people from the old belief that insanity was a crime to an opinion too indulgent in the opposite direction—namely, that crime should be healed as insanity and provoke our curious regard and sympathy—elicits Dr. Wharton's comment in this connection. 1 Whart. & Stillé, pref. Next to determining the legal responsibility of the felon for his crime, nothing so draws

66. **Mental unsoundness involves, we may assume, disorder of will and feeling** as well as of intellect; and hence the feebleness of volition which may subject one to the importunities, the unfair pressure, the undue influence, violent or crafty, of those about him, so as to make the will theirs and not his, and cause it to fail justly of probate on that ground, aside from the reasonableness or unreasonableness of its provisions.<sup>1</sup>

67. **The same legal standard of mental unsoundness is not asserted for invalidating a will** as a contract, nor for avoiding responsibility for crime as in either of these other instances. The question of "guilty" or "not guilty," of incapacity for distinguishing between right and wrong, we may dismiss at once.<sup>2</sup> As between contracts and wills, several eminent judges have laid it down that a man may be capable of making a will, and yet incapable of making a contract or a deed.<sup>3</sup> All this presupposes, of course, that the testator's mind has been left free to operate without constraint or importunity of any sort from interested parties.<sup>4</sup> We should

the host of contending medical experts into our courts in these days as the inquiry whether one who has left behind him a will for his survivors to quarrel over was of sound and disposing mind when he executed it.

<sup>1</sup> This is a subject of much prominence in our present connection; yet coercion might be exerted upon a sane person to a like result. And in dealing directly with testamentary incapacity on the ground of insanity, a topic highly interesting and important under our present law of wills, we shall take the natural order of treating first of the plainer manifestations of this incapacity, thence passing to the finer shades of mental disorder, until our investigation becomes complete.

<sup>2</sup> A less degree of imbecility is necessary to invalidate a will than would be ground of acquittal from a criminal charge. *McTaggart v. Thompson*, 14 Penn. St. 149. Cf. 1 Conn. 102.

<sup>3</sup> *Banks v. Goodfellow*, L. R. 5 Q. B. 567; 4 Wash. C. C. 262; 65 Penn. St. 368; *Brinkman v. Rueggessick*, 71 Mo. 553; 83 Mo. 175; *Wood v. Lane*, 102 Ga. 199, 29 S. E. 180; *Kerr v. Lunsford*, 31 W. Va. 659 (deed). In a sale, for example, mind is opposed to mind, and interests and efforts so antagonize that the just bearings of the whole transaction are less clearly traceable than where, under the common circumstances of a testamentary disposition, one is left free to act upon his own perceptions merely. As a general proposition, less capacity, it is said, will suffice for making a will than to transact ordinary business. *Converse v. Converse*, 21 Vt. 168, 52 Am. Dec. 58; *Prentiss v. Bates*, 88 Mich. 567, 50 N. W. 637. But cf. 17 Ala. 84. And see *Stewart v. Lyons*, 47 S. E. 442, 54 W. Va. 665; *Crossan v. Crossan*, 70 S. W. 136, 169 Mo. 631.

<sup>4</sup> For, surely, no class of property dispositions is so liable to close, secret, and sinister influences while the owner is mentally failing as the present; and this, more particularly, where one's disposing act dates at his last illness. Nor should it be forgotten that a sale or other single transaction affects usually a small portion of one's estate, while a testament generally embraces the whole by a sweeping transfer; that if minds antagonize in ordinary business, that antagonism may serve to recall or modify afterwards, or, at all events, to explain the mutual intent where injustice ensues; whereas the testamentary act once operating cannot be revoked or altered; its motives are outside the scope of one's own explanation, and the injustice, if any be done, is forever beyond the reach of correction. Furthermore, the testamentary act is that of an individual, and only imperative when one wishes to break the common rule of succes-

conclude, that as between contract and testamentary capacity, it is the fairer mode to contrast the standards, when the contrast becomes needful at all, by making the comparison that of differing standpoints rather than of differing degrees from a common standpoint.<sup>1</sup>

68. In general, if the testator possesses a mind sufficient to understand without prompting the business about which he is engaged when his will is executed, the kind and extent of the property to be willed, the persons who are the natural objects of his bounty, and the manner in which he desires the disposition to take effect, his will is a good one.<sup>2</sup> It follows that one who is

sion, and disturb the presumptive rights of spouse and kindred surviving him; whereas business transactions *inter vivos* involve reciprocal interests which the State does not regulate and the parties themselves cannot dispense with; so that the inquiry may here, if not elsewhere, be pertinent, how far should courts go in upholding an unjust disposition made by one of doubtful capacity in derogation of the public policy announced in the statutes of descent and distribution? As opposed to the common expression that a less degree of capacity is requisite for making a will than a contract may be cited the opinion of Sir J. Hannen (1873) in *Boughton v. Knight*, L. R. 3 P. & D. 64, which he explains in *ib.* 72 note. Cf. *Chandler v. Barrett*, 21 La. 58, 99 Am. Dec. 701.

<sup>1</sup> It is more safely said that if a person has sufficient understanding and intelligence for transacting his ordinary business, he is presumed sufficiently capable of making a will; and to such a test testamentary capacity is often referred in dealing with witnesses who testify to the point of mental unsoundness. See *Benoist v. Murrin*, 58 Mo. 307; 144 Mo. 354; 3 Humph. 278; 83 *post*. Various cases support this statement of the court. 147 Ill. 370; 75 Ill. 260, 262. But testamentary capacity does not presume capacity for ordinary business. See 70 N. E. 675, 209 Ill. 193; 17 Pick. 373; 71 Mo. 553 (unable to manage estate, yet capable of making a will); *Johnson v. Farrell*, 74 N. E. 760, 215 Ill. 542; *Turner's Appeal*, 44 A. 310, 72 Conn. 305.

It is still preferable, we think, to treat testamentary capacity, so far as possible, as something furnishing a distinct standard from that of general contract capacity, and requiring mental soundness to be tested accordingly; our true criterion at present being, not whether one was capable of this or that transaction *inter vivos*, but whether he was capable of making a will. Thus, we shall presently see (c. 8 *post*) one may be capable of transacting complicated business which involves much power of intellect, and yet be under some insane delusion which vitiates the will he has executed.

All other things being equal, the will a fair one of itself, properly executed, and neither undue influence nor insanity appearing to have operated in its composition, the courts are disposed to sustain it. It is only when one's insanity renders him plainly incapable of acting rationally in the ordinary affairs of life and the disposition in question is the fruit of such incapacity, that the difficulty becomes readily solved by setting his will aside. Mental unsoundness which falls short of this, namely that which bodily infirmity, distress, the decay of advancing age, habitual drunkenness, or some physical defect or peculiarity of character engenders, does not produce a conclusive incapacity to make a will.

<sup>2</sup> *Delafield v. Parish*, 25 N. Y. 10; 65 Penn. St. 365; 28 Mo. 115; 39 Penn. St. 191; 45 Ill. 485; *St. Leger's Appeal*, 34 Conn. 435; *Lewis's Will*, 51 Wis. 101, 7 N. W. 829; *Wilson v. Mitchell*, 101 Penn. St. 495, 502; 110 Penn. St. 339, 5 A. 614; *Cline v. Lindsey*, 110 Ind. 337, 11 N. E. 441; *Delaney v. Salina*, 34 Kan. 532, 9 P. 271; *Prather v. McClelland*, 76 Tex. 574, 13 S. W. 543; 31 W. Va. 659, 8 S. E. 493; 99 Mo. 160, 17 Am. St. Rep. 552, 12 S. W. 510; *McCoon v. Allen*, 45 N. J. Eq. 708, 17 A. 820; 51 N. J. Eq. 315, 30 A. 428; 50 N. J. Eq. 439, 26 A. 573; 150 Ind. 159, 49 N. E. 948; 50 S. C. 95, 27 S. E. 555; *Hall v. Perry*, 87 Me. 569, 47 Am. St. Rep. 352, 33 A. 160; *Taylor v. Cox*, 153 Ill. 220, 38 N. E. 656; *Martin v. Thayer*, 37 W.



incapable at the moment of comprehending the nature and extent of his property, the disposition to be made of it by testament, and the persons who are or should be provided for, is not of a sound disposing mind. And if this mental condition be really shown to exist, the will must fail, even though he may have a glimmering knowledge that he is endeavoring to make a testamentary disposition of his property.<sup>1</sup>

69. **Some of the earlier cases laid down the rule** of testamentary capacity with much more subservience to the purported expression of one's last wishes. They seem to have assumed that there must be a total want of understanding in order to render one intestable; that a court ought to refrain from measuring the capacity of a testator, if he have any at all; and that unless totally deprived of reason and *non compos mentis*, he is the lawful disposer of his own property, so that his will stands as a reason for his actions, harsh as may be its provisions.<sup>2</sup> This ascribes altogether too great sanctity to the testamentary act of an individual as opposed to the law's own will set forth by the statutes and founded in common sense; and it is well that the best considered of our latest cases recede from so extreme and false a standard.

70. **Yet incapacity is more than weak capacity**, and, as already intimated, mere feebleness of mind does not suffice to invalidate a will. While it is true that it is not the duty of the court to strain after probate, nor in any case to grant it where grave doubts remain unremoved and great difficulties oppose themselves to so doing,<sup>3</sup> neither is it the duty of the court to strain against pro-

Va. 38, 16 S. E. 489; 113 Mo. 248, 20 S. W. 890; 36 Neb. 393, 54 N. W. 670; 98 Ala. 267, 12 S. 803; *Todd v. Todd*, 77 N. E. 680, 221 Ill. 410; *Berry v. Trust Co.*, 53 A. 720, 96 Md. 451, 94 Am. St. Rep. 598; *Catholic University v. O'Brien*, 79 S. W. 901, 181 Mo. 68; *Hartley v. Lord*, 80 P. 433, 38 Wash. 221. Too much stress should not be laid on a comparison between one's contemporaneous and former business habits. *Brown v. Riffin*, 94 Ill. 560, 569.

Lord Cranworth has justly said of testamentary incapacity in *Boyse v. Rossborough*, 6 H. L. Cas. 45, that the difficulty to be grappled with arises from the circumstance that the question is almost always one of degree.

"Though the mental frame may be reduced below the ordinary standard, yet, if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains." *Banks v. Goodfellow*, L. R. 5. Q. B. 567. Phrases in the local statute should be considered. 144 Ind. 463, 43 N. E. 560; 145 Ind. 682, 44 N. E. 757.

<sup>1</sup> *Young v. Ridenbaugh*, 67 Mo. 574; *Wilson v. Mitchell*, 101 Penn. St. 495, 502; 110 Penn. St. 339, 5 A. 614; *Campbell v. Campbell*, 130 Ill. 466, 22 N. E. 620; 6 Dem. (N. Y.) 123; *Chrisman v. Chrisman*, 16 Oregon, 127, 18 P. 6.

<sup>2</sup> *Stewart v. Lispenard*, 26 Wend. 255, modified by *Delafield v. Parish*, 25 N. Y. 10; 2 J. J. Marsh. 340; 1 Bradf. 360; *Dornick v. Reichenbach*, 10 S. & R. 84. Perhaps, after all, this difference is more of *dictum* than of conclusion upon all the proof.

<sup>3</sup> *Delafield v. Parish*, 25 N. Y. 35, *per curiam*.

bate, and impeach the will merely because it is made in old age or upon the sick bed, after the mind has lost a portion of its former vigor, and has become weakened by age or disease.<sup>1</sup> Weakness of memory, vacillation of purpose, credulity, vagueness of thought, may all consist with adequate testamentary capacity, under favorable circumstances. And a comprehensive grasp of all the requisites of testamentary knowledge in one review appears unnecessary provided the enfeebled testator understands in detail all that he is about and chooses rationally between one disposition and another.<sup>2</sup>

71. The testator's mind should act without prompting or external pressure in the particulars of the testamentary business in question. And these particulars he should hold in mind long enough to perceive their obvious relations to each other, and be able to form some rational judgment in regard to them,<sup>3</sup> and

<sup>1</sup> *Meeker v. Meeker*, 75 Ill. 260; *Bundy v. McKnight*, 48 Ind. 502; *Duffield v. Robeson*, 2 Harring 379; *Legg v. Myer*, 5 Redf. 628, 635; 28 Barb. 653.

Far from true appears the abstract proposition that a testator who can make one will can make any will; nor to this writer does it seem that the community would suffer, if, after all, the court of probate, in every case of doubtful capacity, of doubtful intellect and volition in the testator, permitted the justice or injustice of the particular disposition to turn the scale. But cf. majority of the court in 25 N. Y. 97.

To charge a jury to find whether a testator is "crazy" or not is not in good form, and the word is quite inappropriate in such an issue.

Calvin, Surrogate, in *Townsend v. Bogart*, 5 Redf. 93, 105, suggests that the use of the term *compos mentis*, which is sometimes made the standard of testamentary capacity as meaning "sound mind," will often mislead. And he commends the careful expression of the court in *Bundy v. McKnight*, 48 Ind. 502. See also Sir J. P. Wilde in *Smith v. Tebbett*, L. R. 1 P. & D. 398, 400.

<sup>2</sup> *Wilson v. Mitchell*, 101 Penn. St. 495, 502, approved in 110 Penn. St. 339, 5 A. 614; *Jackson v. Hardin*, 83 Mo. 175; *Delaney v. Salina*, 34 Kan. 532, 9 P. 271. It is not necessary that the testator should know the number and condition of his relatives and their claims upon his bounty, nor that he should understand the reason for giving or withholding his bounty from any such relatives. *Spratt v. Spratt*, 76 Mich. 384, 43 N. W. 627. Nor that he should remember the names of absent relatives. *Kramer v. Weinert*, 81 Ala. 414, 1 S. 26. Nor that he should call to mind every item of his property and the value of each. *Reichenbach v. Ruddach*, 127 Penn. St. 564, 18 A. 432. Nor, of course, that he should understand the precise legal effect of the provisions he makes, for on such points the most sane of testators may fail. 21 Mich. 141, 142. Nor that one shows no failure of memory and weakening powers, though instances on this point might be pertinent as proof. *Richmond's Appeal*, 59 Conn. 226, 21 Am. St. Rep. 85, 22 A. 82; 45 N. J. Eq. 890, 19 A. 622. Nor that the testator should comprehend the provisions of his will in their legal form, like a skilled lawyer; provided he understood the simple elements of which his disposition was composed and the will accorded substantially with his wishes. 102 Ga. 490, 501, 31 S. E. 100.

It is misleading and too sweeping to rule that if a testator's mind was "unsound" he could not make a valid will. *Durham v. Smith*, 120 Ind. 463, 22 N. E. 333; *Reichenbach v. Ruddach*, 127 Penn. St. 564, 18 A. 432.

<sup>3</sup> *Delafield v. Parish*, 25 N. Y. 9; 76 Mich. 364, 43 N. W. 310; *Hall v. Perry*, 87 Me. 569; *Sayre v. Princeton University*, 90 S. W. 787, 192 Mo. 95; 47 Am. St. Rep. 352, 33 A. 160.

to execute with all due formalities. Though one should be in a dying condition his capacity is sufficient, if, when his attention is aroused, his mind acts clearly and with discriminating judgment as to the thing to be done and its bearings.<sup>1</sup>

72. When we come to examine in detail the various classes of cases where sanity and the capacity to make a will have been in controversy, the general doctrine, as above stated, will more clearly appear with its qualifications. We shall find that the criterion in such cases is best taken as *sui generis* and not referred to the standard of general contract capacity; though unquestionably the habit and capacity of any testator to actively transact his ordinary business and make his own contracts furnish strong evidence of the capacity at issue. The vital question in any such case should be, whether upon all the evidence the particular instrument propounded for probate was or was not under all the circumstances the real testamentary disposition (and the last one, of course) of a mind neither deranged in producing it, nor operating under stress of error, fraud, or undue influence. And to decide this question properly requires a careful view of the particular case in all its bearings without too rigid an adherence to any general maxims of capacity.<sup>2</sup>

73. The will of a dying person, made very close to the point of death, requires a careful scrutiny of the surrounding circumstances which bear upon capacity and free volition. It is certainly a very dangerous period for taking into mind for the first time the arrangement of a complex disposition of property, or even for executing intelligently. But, after all, the question of sanity or insanity, freedom of will or coercion from without, is, as in other cases, the material one to be decided upon all the facts.<sup>3</sup> One may be too weak physically to do more than make a mark to the instrument, and yet be mentally competent; and one may be mentally failing and yet the will may stand as the disposition framed when mentally strong.<sup>4</sup>

<sup>1</sup> *Bevelot v. Lestrade*, 153 Ill. 625, 632, 38 N. E. 1056.

<sup>2</sup> The time and place to be regarded in determining the validity of the will should be essentially the time and place of its execution. *Stewart v. Lyons*, 47 S. E. 442. See c. 9, *post*; 44 W. Va. 665. But as to presumptions see *post*.

<sup>3</sup> Where the act of execution *in extremis* relates not to a will just framed in the mind, but to one which has reduced to writing the results of the testator's previous deliberation and direction, at an earlier stage of illness, it deserves peculiar indulgence when drafted conformably and then executed in due form. *Hathorn v. King*, 8 Mass. 371, 5 Am. Dec. 106 (a striking instance); 94 Ill. 560; 39 N. Y. 153; *Lewis's Will*, 51 Wis. 101, 7 N. W. 829; 130 Ill. 467, 6 L. R. A. 167, 22 N. E. 620; 16 Oreg. 127, 18 P. 6; *Choate's Will*, 96 N. Y. S. 380.

<sup>4</sup> See 84 *post*.

74. **Mental unsoundness, exhibited in insane delusions,** or what has been loosely styled "partial insanity," does not of itself destroy testamentary capacity necessarily, unless the will in question be the direct offspring of the delusion. Where, in other words, the delusion is altogether collateral to the disposition, the will itself is not invalidated; but where the delusion manifestly operated upon the disposition, then the will must be declared void.<sup>1</sup>

75. **Where a person is laboring under such insane delusion,** or what modern psychology terms monomania,<sup>2</sup> his sanity is to be tested by directing his attention to the subject-matter of such delusion; but where a person is afflicted with habitual insanity unaccompanied by delusions, his sanity is to be tested by his answers to questions, his apparent recollection of past transactions, and his reasoning justly with regard to them and with regard to the conduct of individuals.<sup>3</sup>

76. **Where a will with codicils is contested on the ground of mental incapacity** in the maker, it is not necessary to establish capacity at the several dates when the instruments were executed; for capacity at the last or a later date renders valid the act then done and all the preceding acts republished by it.<sup>4</sup>

77. **Unjust and foolish wills are liable to suspicion;** and notwithstanding the broad principle which maintains testamentary capacity, it is generally found in practice that a will which is partial and unjust in its provisions, absurd, or clearly devoid of natural duty or affection, finds no ready support in the courts. Such wills are not, indeed, void; but their execution is regarded with disfavor.<sup>5</sup> Foolish words, foolish phrases, cannot in these days, however, be said to invalidate any will at the Anglo-Saxon law; and it is doubtful whether they ever did more than furnish as against such an instrument a presumption which more positive evidence of intention ought by the present rule to fortify.<sup>6</sup> But in

<sup>1</sup> In general our latest decisions show a positive reluctance to set aside any will on mere proof that the testator suffered from some dubious mental disorder or weakness, provided it fairly appear that the provisions of the will were not thereby affected. See c. 8, *post* and citations.

<sup>2</sup> See c. 8.

<sup>3</sup> Sir C. Cresswell in *Nichols v. Binns*, 1 Sw. & Tr. 239.

<sup>4</sup> *Brown v. Riffin*, 94 Ill. 560; 3 Redf. (N. Y.) 181. See Part IV, *post*, as to Codicils and republication.

<sup>5</sup> The spiritual tribunals in early times, following the Roman law of inofficious testaments, made little compunction of setting senseless wills aside, or, as Swinburne very strongly expressed it, "if there be but one word sounding to folly." Swinb. pt. 2, § 3, pl. 16. And see *Waring v. Waring*, 6 Moore P. C. 349; 2 Bl. Com. 503.

<sup>6</sup> We have already seen (19, 20) that discrimination by will against the surviving spouse or child is to some extent guarded against, and not wholly by construction:

order to sustain any unjust, unnatural, or absurd will, which may be contested, fair proof at least should be afforded that the testator was of sufficient capacity at the date of execution to comprehend its import; and furthermore, the trier of the case should believe that neither essential mistake on his part nor the fraud nor undue influence of others about him produced so unhappy a disposition.<sup>1</sup> In fine, a harsh and unnatural disposition by the will in question is a circumstance which tends to discredit the maker's testamentary capacity.<sup>2</sup>

78. But where the testator, unaided by others, has made a judicious will containing nothing "sounding in folly" nor failing in natural affection and duty, we find courts strongly disposed to uphold such a will, in any doubtful case of habitual mental derangement.<sup>3</sup> And aside from the claims of what are called the

but the English law does not follow the Roman in avoiding such wills peremptorily as the offspring of incapacity, nor even so as to prevent one absolutely from disinheriting his own offspring. On the contrary, if a testator be legally competent to make his will, and acts freely, his will cannot be impeached because harsh, unequal, unreasonable, imprudent, or unaccountable in its provisions, nor as being a foolish or visionary disposition; nor even as being devoid of natural affection and moral duty. *Boughton v. Knight*, L. R. 3 P. & D. 64; 20 W. Va. 251; *Hubbard v. Hubbard*, 7 Or. 42; 28 Md. 118, 92 Am. Dec. 666; 7 Bush, 491; 138 Mo. 197; *Kaufman's Estate*, 117 Cal. 288, 49 P. 192, 59 Am. St. Rep. 179; *Martin v. Thayer*, 37 W. Va. 38, 16 S. E. 489; 49 S. C. 159, 61 Am. St. Rep. 808, 27 S. E. 16; 48 N. J. Eq. 566, 25 A. 11; *Lewis's Estate*, 152 Penn. St. 477, 25 A. 878; *Gesell v. Baugher*, 60 A. 481, 100 Md. 671; *Townsend's Estate*, 105 N. W. 110, 128 Iowa 621; 70 P. 908, 42 Ore. 345; 84 N. Y. S. 218; *Coffman v. Hendrick*, 32 W. Va. 119, 9 S. E. 65; *Schneider v. Manning*, 121 Ill. 378, 12 N. E. 267; 72 Iowa, 515, 34 N. W. 309; 118 Ill. 199, 8 N. E. 777; 108 Cal. 608, 41 P. 701. It may be that what on the face of the will appears an unnatural disposition, may be reasonably explained. 117 Cal. 262, 49 P. 172, 711. Deep religious conviction, though perhaps narrow and illiberal, may affect one's disposition. 50 N. J. Eq. 733, 26 A. 706. And certainly the more distant or unfamiliar one's heirs and next of kin, the less should he be expected to provide for them, equally or at all, by his testament. Motives for disinheriting kindred, and collateral kindred more especially, may readily appear in proof. See *Smith v. James*, 72 Iowa, 515, 34 N. W. 309. The test of "unnatural" is referable to the testator's own nature and to what might be expected of him. *Morgan's Estate*, 219 Penn. 355, 68 A. 935. Where a person is of varying sanity, and the will appears crazy, unjust, unnatural, or undutiful, it may well be presumed that he executed it while insane or under the insane malady, unless indeed they who propound it can prove to the contrary. L. R. 3 P. & D. 64; c. 8, *post*; 5 Johns. Ch. 148, 158; *Smith v. Smith*, 75 Ga. 477.

<sup>1</sup> *Baker v. Batt*, 2 Moore P. C. 317; *Brogden v. Brown*, 2 Add. 449; 1 Bradf. 394; 2 Dem. (N. Y.) 543.

<sup>2</sup> See *Lamb v. Lamb*, 105 Ind. 456, 5 N. E. 171; 180 Ill. 65, 300, 54 N. E. 154, 321; *Walls v. Walls*, 99 S. W. 969, 30 Ky. Law Ref. 948; *Hardenburgh v. Hardenburgh*, 109 N. W. 1014, 133 Iowa 1; *Blackman v. Andrews*, 150 Mich. 322, 114 N. W. 218.

<sup>3</sup> *Cartwright v. Cartwright*, 1 Phillim. 90; 32 La. Ann. 1055, 36 Am. Rep. 278; *Wilson v. Mitchell*, 101 Penn. St. 495; 21 Mich. 123; *Peck v. Carey*, 27 N. Y. 9, 84 Am. Dec. 220; *Gombault v. Public Administrator*, 4 Bradf. 226; 2 Green Ch. 629; 143 Mo. 348; *Silverthorn's Will*, 68 Wis. 372, 32 N. W. 287; 78 N. E. 591, 222 Ill. 276, 113 Am. St. Rep. 400; *Potts v. House*, 6 Geo. 324; 50 Am. Dec. 329; 1 N. Y. Supr. 351.

natural objects of one's bounty a will made in favor of a person for whom one has a strong and well-founded affection, cannot be called unnatural.<sup>1</sup>

79. **The manner of making and executing the will in question** is an important consideration, as well as the character of the instrument itself. Thus, if an intelligent will be written out clearly by the testator himself this is a strong though not conclusive circumstance; and so, too, where the testator took decidedly the initiative in having the will prepared and executed, instead of yielding or confiding the matter, as it would appear, to those about him.<sup>2</sup>

80. **Testamentary capacity is sometimes contrasted** in complex and simple estates.<sup>3</sup>

81. **The will of one under guardianship is not necessarily void.**<sup>4</sup> In general where a person is placed under a guardianship for positive insanity, the investigation upon which the appointment was based is such as to establish a *prima facie* case that he was, at that date at least, *non compos* and incapable of making a valid will. And the fact of such an appointment, as well as of the testator's continuance under the guardianship, is doubtless a very important one whenever one's will is contested. But such evidence of testamentary incapacity is *prima facie* only and open to explanation by other proof.<sup>5</sup> Such a person may make a valid will, if he be in fact of sound mind at the time of its execution.<sup>6</sup>

<sup>1</sup> See *Ruffino's Estate*, 116 Cal. 204, 48 P. 127; *French v. French*, 74 N. E. 403, 215 Ill. 470; 51 A. 501.

<sup>2</sup> See e.g. *Cartwright v. Cartwright*, 1 Phillim. 90 (a strong instance in point, where a will was established as made during a lucid interval); *Wallen v. Wallen*, 57 S. E. 596, 107 Va. 131; 73 N. Y. S. 812. But cf. *Bever v. Spangler*, 93 Iowa, 576, 61 N. W. 1072. See also 255 *post*.

<sup>3</sup> 1 *Demarest*, 503, 511; *Campbell v. Campbell*, 130 Ill. 467. Such a maxim ought to regard the particular testator in his usual dealings.

<sup>4</sup> As to guardianship for persons insane, spendthrifts, etc., see *Schoul. Dom. Rel.* §§293, 304, 305.

<sup>5</sup> 10 *Moore P. C.* 244; 10 R. I. 538; 18 *Pick.* 115; 27 *Geo.* 593; 39 *Vt.* 267; *Ames v. Ames*, 67 P. 737, 40 *Ore.* 495. And so with the fact of being in an insane asylum. *Draper's Estate*, 64 A. 520, 215 *Penn.* 314. See *Cowdry's Will*, 60 A. 141, 77 *Vt.* 359 (statute); 102 *Me.* 72, 66 A. 215; *King v. Gilson*, 90 S. W. 367; 191 *Mo.* 307.

<sup>6</sup> *Cooke v. Cholmondely*, 2 *Mac. & G.* 22; 16 *Jur.* 864; 54 *Penn. St.* 216; *Rice v. Rice*, 50 *Mich.* 448, 15 N. W. 545; 57 *Cal.* 529; *Slinger's Will*, 72 *Wis.* 22, 37 N. W. 236, cases *supra*. Nor is the character of the appointment thus made invariably such as adjudges one an insane person at all; and if the record falls short of establishing that sanity was put at issue in the proceedings for guardianship, not even a *prima facie* case of testamentary incapacity is thus made out. *Rice v. Rice*, 50 *Mich.* 448, 15 N. W. 545. And see as to guardianship for drunken or spendthrift habits, 50 *Barb.* 645; *Leckey v. Cunningham*, 56 *Penn. St.* 370.

Nor, on the other hand, does a judgment which declared a person of sound mind and removed a guardian who had been placed over him, conclusively prove him of testamentary capacity in issues of probate, like the present; though such evidence might carry much weight.<sup>1</sup>

82. **An adjudication of idiocy imports so base a mental condition** that incapacity to make a will ought from this circumstance to be more readily inferred than where one is placed under the usual guardianship as a lunatic or generally insane.<sup>2</sup>

83. **The word "memory" is much used in connection with this subject** of testamentary capacity, coupled with "mind." A disposing memory is understood to be one which is capable of recalling to the testator's own view all his estate and all the persons who naturally and properly would partake under his disposition of it.<sup>3</sup> Mere decay or feebleness of memory, or absent-mindedness or forgetfulness, ought not, then, to invalidate a will, unless amounting, under our general rule, to a mental incapacity to collect the particulars essential to a just testamentary disposition.<sup>4</sup>

84. **Though one's will may allege that the testator is of sound health**, neither the statement nor such a condition is essential to the validity of the instrument. In other words, testamentary capacity is not conditional upon the possession of sound health or of great vigor or activity, whether intellectual or physical. If, therefore, the will in question be the free act of the testator, within the scope of the rule for testamentary capacity already stated, the disposition of one in impaired health should stand.<sup>5</sup>

<sup>1</sup> Fenton's Will, 97 Iowa, 192, 66 N. W. 99.

<sup>2</sup> Yet such collateral adjudication, especially if made long after the will was executed, is not conclusive against the probate of the instrument after the testator's death. *Townsend v. Bogart*, 5 Redf. 93.

<sup>3</sup> *Harwood v. Baker*, 3 Moore P. C. 282; 2 Hagg. 122. "It is not necessary that he collect all these in one review. If he understands in detail all that he is about, and chooses with understanding and reason between one disposition and another, it is sufficient for the making of a will." 101 Penn. St. 495, 502. Lord Coke (6 Co. Rep. 23) mentions the necessity of a "disposing memory" or a "safe and perfect memory"; and the time-honored phrase, which asserts the testator's confidence in his own mental capacity, is, as wills are commonly drawn, "being of sound and disposing mind and memory"; with perhaps the prefix "being in sound [or sufficient] bodily health." In a broad sense, however, the phrase "sound mind" covers the whole subject. *Boughton v. Knight*, L. R. 3 P. & D. 64, 66, *per* Sir J. Hannen (1873). And see L. R. 1 P. & D. 398, 400; *Benoist v. Murrin*, 58 Mo. 307, 322. "Sufficient active memory to collect in his mind, without prompting, the particulars," etc. *Hall v. Perry*, 87 Me. 569, 572, 47 Am. St. Rep. 532, 33 A. 160. And see 71.

<sup>4</sup> See *Taylor v. Pegram*, 151 Ill. 106; *Douglas's Estate*, 162 Penn. St. 567; 26 L. R. A. 504; 29 A. 715; *Chappell v. Trent*, 90 Va. 849; 19 S. E. 319; 37 W. Va. 54, 16 S. E. 489; *Southworth v. Southworth*, 73 S. W. 129; 173 Mo. 59.

<sup>5</sup> *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493; 72 N. Y. 278; *Wilson v. Mitchell*, 101 Penn. St. 495; 162 Penn. St. 567, 29 A. 715; 93 N. Y. S. 565; 43 N. J. Eq. 565;

85. **Classification as to insanity was very rude** in the earlier days of our jurisprudence.<sup>1</sup> Idiots and lunatics were the two classes of persons to whom the law formerly extended protection on the score of mental unsoundness, as the classes most plainly told apart; for the former never had reason, while the latter had lost the reason they once possessed. But it was gradually found that many more required such protection, whose symptoms of disorder, though mildly manifested without the violence or notable derangement or intermittent brightness which attended lunacy, had yet equal claim to be regarded as implying a loss, not the natural denial of reason. A decline of intellectual power, of interest in one's usual pursuits, of the capacity for comprehending one's relations to persons and things, marked this phase of mental unsoundness.<sup>2</sup>

86. **Insanity, the word humanely used at the present day to designate** all mental impairments inconsistent with soundness of mind, is more readily concluded from the symptoms in a given case than defined on abstract principle. High legal and medical authority defines it as the prolonged departure, without adequate cause, from the states of feeling and modes of thinking usual to the individual in health. Insanity may involve bodily diseases, but the disease primary and predominant, where it exists, or the congenital defect, has its seat in the brain.

87. **The foregoing definition of insanity is one of medical jurisprudence,** and medical science at the present stage of its progress confesses itself unable to frame a more exact one. Psychologists have not classified mental unsoundness with success; for the same names have been used to denote quite distinct phenomena according to the standpoint of observation; and, moreover, the insane delusion, the symptom, has been long treated by them as a sub-

12 A. 621 (last stage of consumption); *Gilman v. Ayer*, 52 A. 1131, 63 N. J. Eq. 806; *Gibon's Will*, 57 N. E. 1110, 163 N. Y. 595 (cancerous trouble); *Kirsher v. Kirsher*, 94 N. W. 846, 120 Iowa 337 (apoplexy); *Stall v. Stall*, 96 N. W. 196, 69 Neb. 653; *Graham v. Deuterman*, 75 N. E. 480, 217 Ill. 235, c. 7, *post*.

<sup>1</sup> See 4 Co. Rep. 123; 2 Bl. Com. 497

<sup>2</sup> Instead, therefore, of giving the word "lunacy" a scope large enough to include them, the modern disposition is to apply specific terms to describe various disorders whose range of reason is wider than that of the utterly imbecile and brute-born idiot. Monomaniacs, or those having insane delusions, are examples of this milder type of insanity; those, again, who are affected with a delirium like that produced by drunkenness, sufficient to drown the reason for the time being; persons grown childish from decay of the mental powers by reason of old age, whose affliction is styled senile dementia; and so on. But, after all, the manifestations of insanity are subject to so great variation that we may not easily define them, nor the word "insanity" itself.



stantive disease, indicating that the mind may be unsound in some factor but sound in all the others.<sup>1</sup>

88. **Courts attempt no exact classification of this subject, but apply practical tests.** In criminal cases they are governed by their tests of responsibility; and in civil cases by the amount of capacity shown in connection with the transaction in question.<sup>2</sup>

89. **The incapacity of infants, married women, aliens, and the like may,** where the law recognizes its existence, be pronounced abstract or of general and absolute force; but whenever an issue of insanity or undue influence is presented, the question appears concrete rather, *devisavit vel non*; was that will the free and intelligent product of the testator's mind or not?<sup>3</sup>

<sup>1</sup> "It is the latter tendency, in fact," observes a sound writer on this subject, "that has, more than all other causes, tended to lower the authority of psychology with the courts." And he proceeds to state that the weight of psychological opinion is now to discard this process of disintegration, and to treat the mind as a unit, which, whenever diseased, however distinctively the disease may manifest itself, is diseased as a whole. Wharton & Stillé Med. Jur. § 305.

<sup>2</sup> The whole proof in a given case (aided, perhaps, but not guided, by the opinion of voluntary medical experts) is laid usually before a jury, to determine, by weighing it after a common-sense fashion, whether the person was at the time and in the act responsible or irresponsible, mentally capable or mentally incapable.

<sup>3</sup> "Testamentary capacity" is not, perhaps, a happy term to use here, but out of deference to the courts we may still employ it; with this qualification, that, excepting possibly in brutish types where reason is a blank, no ideal standard of capacity is offered for gauging the brain, but court or jury must determine whether a weak or diseased mind made in the given instance a normal disposition by testament or not. Even here, nevertheless, a general comparison of the various symptoms and forms of mental derangement which are exhibited in our testamentary causes will greatly assist the investigation and guide to a just conclusion.

## CHAPTER V.

## INCAPACITY OF IDIOTS, IMBECILES, AND PERSONS DEAF, DUMB, AND BLIND.

90. **Idiocy, which is insanity in its lowest type, is utterly inconsistent with the power to dispose by will, or indeed with mental capacity of any kind, or even in extreme cases with accountability for crime.** We may not well define this condition; but an idiot is recognized by all intelligent persons who deal with him, and is a fit subject for the asylum, unless his own family will provide tenderly for his welfare and keep him secluded from society.<sup>1</sup>

91. **Idiocy, on the whole, appears to be in strictness a natural sterility of mind, incurable from birth, and not the later perversion of a developed understanding; yet we should note that the lapse of an intelligent mind, through disease or decay, into a totally dark and benighted condition, is sometimes, in popular speech, included under this head, or, more properly, that of imbecility.**<sup>2</sup> The great characteristic of idiocy or utter imbecility is permanence with little or no variation.<sup>3</sup>

92. **Idiots and utter imbeciles of every description are necessarily devoid of testamentary capacity.**<sup>4</sup> Such persons may acquire

<sup>1</sup> Idiocy presupposes a want of understanding from nativity and allies its subject to the brute creation. The scale rises from idiots proper to fools and simpletons. Idiocy results either from congenital defect or from some obstacle to the normal development of the faculties in childhood, and is manifested generally by malformation of the head and brain, and a repulsive expression. Unfortunates of this class have been taught decent and proper habits, and may even be trained to some degree of efficiency in rude industrial pursuits; but education has never fitted them for un-painful companionship with the intelligent part of mankind, for whose society animals like the dog or horse, from their lower but positive plane of intelligence, are naturally so well fitted, while here the hidden propensities of the human but unnatural brute suggest a constant source of danger. 1 Redf. Wills, 60, 61, citing Dr. Howe.

Some of our earlier text writers, whose observations of mental phenomena could not have been profound, were at pains to discern some legal test of idiocy. Fitzherbert perhaps the first of them, laid it down that if a person could not count twenty pence, or tell who were his father and mother, or how old he was, he was to be set down as an idiot; but that if he knew and understood his letters, and could read by another man's teaching, he was not. F. N. B. 532 B. As Lord Hale has correctly observed, all this may serve for proof, but it is too narrow for conclusion; and idiocy is in any case a question of fact to be settled by all the proof, and sometimes by inspection. 1 Hale P. C. 29; Hovey v. Chase, 52 Me. 304.

<sup>2</sup> See 1 Redf. Wills, 61, 65, 66 (as from some sudden nervous shock causing a gradual lapse into permanent imbecility)

<sup>3</sup> Except for a possible variation of excitement. *Bannatyne v. Bannatyne*, 14 E. L. & Eq. 581, 590, 591.

<sup>4</sup> *Bannatyne v. Bannatyne*, 14 E. L. & Eq. 581, *per* Dr. Lushington; *Converse v. Converse*, 21 Vt. 168, 52 Am. Dec. 58. Cases of incapacity where intellect is mani-

a title in property by act of the law, but they cannot manage their own affairs, nor make a valid contract, nor of course a will; nor are they often responsible for criminal acts; in short, the civil disability of an idiot or utter imbecile is as complete as possible.

93. **An instance of base mental condition, approximating idiocy, in one of whose incapacity** those who planned for her property appear to have taken advantage may be cited from our later reports.<sup>1</sup>

94. **Persons born deaf, dumb, and blind were long presumed** to be idiots; for the senses being the only inlets of knowledge, and these, the most important of them, being closed, ideas and associations were shut out from the mind.<sup>2</sup> It followed that no such person was capable of making a valid will.<sup>3</sup> Down to a period scarce a hundred years remote this opinion widely prevailed; a contempt for physical infirmity, long characteristic of the English race, giving emphasis to the hopeless condition of these unfortunates. Even the deaf-mute, so born, whose eye was quick to observe, has been remitted to the same rule of incapacity, for, though he might be intelligent, others did not commonly find him intelligible.<sup>4</sup>

tested in a very low degree may be dismissed from the present consideration. *Stewart v. Lispenard*, 26 Wend. 255. If the alleged idiot can be shown to have intelligently and without constraint or fraud performed acts of business during the period in which idiocy is claimed to exist, he is no idiot at all. *Bannatyne v. Bannatyne*, 14 E. L. & Eq. 581, 16 Jur. 864, is a case in point.

<sup>1</sup> See *Townsend v. Bogart*, 5 Redf. (N. Y.) 93 (1881). As to the alleged testatrix it appeared that she was a member of the Methodist church, and attended church and Sunday school regularly; that she took care of her room and person, and could do some light housework and needlework. But she was in poor health and more than fifty years old, was afflicted with stuttering, uttered only short sentences, never learned to read or write, though she had attended school for three years, could not count more than ten, nor tell the time of day from the clock, nor add or multiply; had no idea of the value of property, or of money beyond ten cents, was easily lost in familiar streets, had no understanding of what her estate was worth; otherwise evinced a weak mind, being unable to attend to most of those things which persons of ordinary intelligence can perform; had two sisters, one of whom was in an insane asylum, and in 1871 was herself adjudged an idiot. She had simply made her mark to the paper offered as her will. Upon this testimony the court refused to admit the will to probate.

<sup>2</sup> 1 Wms. Exrs. 17; Swinb. pt. 2, § 4, pl. 2.

<sup>3</sup> 2 Bl. Com. 497 states the incapacity firmly as to those *born* deaf, dumb, and blind. And as late as *Brower v. Fisher*, 4 Johns. Ch. 441 (A. D. 1820), the deaf and dumb by nativity were considered as *prima facie* insane until capacity was proved by special examination. The decision under an inquest cleared, to be sure, the defendant, because the presumption was overcome, and Chancellor Kent refused to deem him an idiot from the mere circumstance of being born deaf and dumb.

<sup>4</sup> Infirmities such as these may be, and, we think, usually are, purely physical in their origin, involving no abnormal condition of the brain. But like a solitary prisoner of state who pines for years in a dark dungeon, one lapses into mental disorder, or his faculties become stunted and fail of their natural development, because sympathetic

95. But the presumption of idiocy and testamentary incapacity in those born deaf, dumb, and blind was by the common law *prima facie* only, and might always be overcome by proof that the person had sufficient understanding; in which case he was at liberty to declare by signs a will, which, under present statutes, ought further to be reduced to writing, according to his wishes, and suitably executed.<sup>1</sup>

96. Persons not born deaf, dumb or blind should be presumed capable mentally. Deafness, dumbness, blindness may, to be sure, like a humpback or splay-foot, the loss of a limb or some incurable disease, or any other impediment to social enjoyment, produce in extreme cases moroseness and distortion of character; but the progress towards mental incapacity, if there be any, is usually very gradual. Nor can we easily conceive of a person who is made a deaf-mute by causes which supervene the state of infancy.<sup>2</sup>

97. It is evident, however, that the deaf, dumb, and blind are peculiarly liable to error and imposition, not to add constraint,

intercourse and the educating process are wanting. Particularly is this true of those born deaf, dumb and blind; for when disqualification comes through the failure of the senses after the mind has developed, so that solitude is not vacancy, or where one at least of these three channels of social intercourse is left open, capacity ought more readily to be presumed than incapacity.

Deaf-mutes are found in our own times as bright and intelligent as the average of mankind in any class, and the remarkable instance of Laura Bridgman has shown the humane world, since 1848, what training combined with sympathy can do to redeem one born deaf, dumb, and blind from the reproach of idiocy. It should be set down, that, like the solitary captive in his dungeon, such beings have become mentally deranged in the past more from the want of an outlet than an inlet; that the callousness or cruelty of the strong has proved their crushing misfortune. For no one is so physically bereft of the senses, that mind, if there be one, cannot in some way respond to mind.

<sup>1</sup> Modern alphabets and codes make obvious the intention of the dumb, many of whom can express themselves on paper at this day as well as the average of society. It is by no means impossible, then, that one deaf, dumb, and blind should make a valid will; and that deaf-mutes or any others whose senses are not deficient beyond one or two of these infirmities may do so is clear. *Brower v. Fisher*, 4 Johns. Ch. 441, per Chancellor Kent; *Weir v. Fitzgerald*, 2 Bradf. 42, 2 Bradf. 265; 1 Spears, 256; *Potts v. House*, 6 Geo. 324, 50 Am. Dec. 329; *Dickenson v. Blisset*, 1 Dick. 268; *Harper, Re*, 6 M. & Gr. 731. Deafness, though absolute, creates no incapacity. In short, it is doubtful whether the presumption of incapacity retains in our law any force whatever as to the deaf, dumb, and blind; but if it does, very slight proof will dispel it, in any case where education has drawn out the imprisoned intellect. *Gombault v. Public Admr.*, 4 Bradf. 226.

<sup>2</sup> Instances may be found, in the reports, where the will of a blind and deaf person, made when he was more than a hundred years old, has been allowed probate. *Wilson v. Mitchell*, 101 Penn. St. 495. And see *Lowe v. Williamson*, 1 Green Ch. 82; *Gombault v. Public Admr.*, 4 Bradf. 226; 2 Bradf. 42. Blindness, deafness, or dumbness, in a case like this, and whenever, in fact, the disability was not congenital, may still be competent as bearing upon the issue of mental capacity, of will or no will, but the infirmity itself affords no presumption whatever of legal disqualification.

in making their wills, so often dependent are they upon others for expressing their last wishes, if not physically helpless besides.<sup>1</sup>

98. **One with an impediment makes the most intelligible will** where he avoids the uncertainty peculiar to that impediment. Thus the educated man, deaf or speechless, who writes or carefully reads to himself his own will, and makes the most of his sight, enters upon a disposition not likely to fail. The blind has his own corresponding precautions to take, and should naturally make the most of his other organs.<sup>2</sup>

99. **In a case, therefore, of mere blindness, or other physical infirmity**, if no allegation of deception, undue influence, essential error, or fraud of any kind is made or sustained, probate of the will should be granted upon satisfactory evidence that the testator knew and approved of the contents of the instrument. Our law does not prohibit the deaf, dumb, or blind from making their wills. Defects of the senses and bodily defects, or diseases in general, do not incapacitate if the testator possesses sufficient mind to perform a valid testamentary act.<sup>3</sup>

<sup>1</sup> That mode of execution which is most intelligible to the outside world, as well as to intimates, fellow-sufferers, and deaf and dumb instructors, is the most prudent, on the whole, for making it clear that the will attested was the product, in all respects, of the testator's own mind. See *Owston's Goods*, 2 Sw. & Tr. 461; 3 Sw. & Tr. 431; 2 Bradf. 261; *Gombault v. Public Admr.*, 4 Bradf. 226.

<sup>2</sup> It is highly expedient, doubtless, that such a will should not be executed or witnessed without being first carefully read to the testator aloud. 3 Curt. 63; 2 Bradf. 42. The old law, Roman and English, insisted much upon that point. Swinb. pt. 2, §11; Gaius, ii, 102-104. Yet the testator's knowledge and approval of the contents being the main thing, wherever this is assured by adequate proof of some sort, the other requirement may well be dispensed with. Good reason might exist for keeping witnesses ignorant as to the contents of the will read to the testator which they are called upon to attest; but it is not necessary to show even that the identical paper produced for probate was ever read over to the testator himself. *Fincham v. Edwards*, 3 Curt. 63, affirmed in 4 Moore P. C. 198; 6 S. & R. 496; *Hess's Appeal*, 43 Penn. St. 73, 82 Am. Dec. 551; 3 Leigh, 32; 7 Geo. 564, 50 Am. Dec. 411; *Martin v. Mitchell*, 28 Ga. 382; 9 Md. 540. In short, the blind testator's knowledge of the contents of the instrument may be inferred from the whole of the testimony, and the circumstances attending its execution. *Guthrie v. Price*, 23 Ark. 396; *Day v. Day*, 2 Green Ch. 551; 89 P. 377 (Oreg. 1907). His declarations made after the execution of the will are competent to show that he knew what provisions his will contained at the time he executed, and that the instrument, in fact, embodied just what he purposed it should. *Davis v. Rogers*, 1 Houst. 44; *Hurleston v. Corbett*, 12 Rich. 604.

<sup>3</sup> In the probate of wills executed by a blind, deaf, or dumb testator, there is no positive requirement that witnesses should be able to depose that the testator was cognizant of the contents of the paper which he declares to be his will, and desires them to attest; though there can be no question that the more prudent and proper course is for the disabled testator, by appropriate acts, to make that cognizance clear to them. Additional proof in all cases of an infirm testator may be supplied *abundante*, on such a point. *Fincham v. Edwards*, 3 Curt. 63; *Weir v. Fitzgerald*, 2 Bradf. 42.

Some of eminent authority appear still to regret the departure of that ancient injunction that the will of a testator who is blind or cannot read should be read over

## CHAPTER VI.

## LUNACY AND GENERAL MENTAL DERANGEMENT.

100. **Mental unsoundness in the medium degree gives the scope** to this chapter.<sup>1</sup> Insanity, to define that word, settles, in the opinion of the best medical men, into a comparison of the individual with himself and not with others; it imports some marked departure from his natural and normal state of feeling and thought, his habits and tastes, which is either inexplicable or best explained by reference to some shock, moral or physical, or to a process of slow decay, showing that his mind is becoming diseased and disordered. Perhaps the seed of hereditary malady is germinating within him; perhaps the pressure of some sudden calamity affecting his future life and prospects, or some apprehended danger, is too great for the brain to bear up; its walls give way to the strain, and those most intimate with him, and not seldom the individual himself, will be found conscious that some sort of mental derangement has taken place.<sup>2</sup>

101. **Lunatics and idiots constituted formerly the only two classes of which** the courts took cognizance when called upon to protect persons who were mentally deranged. To idiots who were supposed never to have had reason, applied the term *dementia naturalis*; but to lunatics *dementia accidentalis*, for their condition involved a loss by mischance of the reason they had once possessed. Hence, lunacy embraced in the broad sense all mental unsoundness not congenital, all, in a word, except idiocy. But this imperfect

to him in the presence of witnesses before he executes it. 1 Redf. Wills, 58. But the liberal rule of the present day on that point is sensible, natural, and founded in practical experience. Even supposing the will to have been thus read over, cognizance does not necessarily follow; yet cognizance is the essential. At the same time, the force and justice of Jarman's observation under this head must be conceded: "That, in proportion as the infirmities of a testator expose him to deception [or, we may add, to material error], it becomes imperatively the duty, and should be anxiously the care, of all persons assisting in the testamentary transaction, to be prepared with the clearest proof that no imposition has been practised [or error incurred]." 1 Jarm. Wills, 34.

<sup>1</sup> The forms and symptoms under which mental derangement manifests itself are so subtle and diversified, varying in fact, in different stages of social progress, running like a mountain brook now above ground and now under it, as to baffle the most wary and skilful of expert observers; and one habit of classification has been superseded by another, without arriving at tests final and unerring. Hence the finer attempts to classify are not satisfactory.

<sup>2</sup> Dr. Ray, *Insanity*, 71 *et seq.*; 1 Redf. Wills, 67.

classification has within a century been discarded, and a new term, "unsoundness of mind," was introduced, which, medical experts tell us, has never been very clearly defined.<sup>1</sup>

102. **Illusions are a proof of unsound mind; and perversion and false judgment are also found here.**<sup>2</sup>

103. **That the task of classifying the different forms of insanity is a formidable one appears in the greatly differing results which the best of medical experts thus far afford.** Tests of causation, symptom and order of development, all of which have their undoubted uses in the study of mental disease, are not unfrequently confounded in the most arbitrary manner. The chief advantage offered by such tests is to medical men and psychologists; for no hypothesis, according to sound modern authority, can be constructed which will meet with exactness every possible case of mental unsoundness that may come before the courts.<sup>3</sup>

104. **As to common symptoms or manifestations of insanity,** the physiognomy of the person, his entire exterior, his gestures, his eyes, his words, the first impression produced upon him by the appearance of a physician, all these aid at once to detect whether he is insane, or *bona fide* sane, or cunningly pretending insanity. The form of the skull is often found peculiar in every description of insanity, but rarely does marked malformation appear save as to idiots and the lowest type of imbeciles. Physical condition, though not necessary to prove insanity, since insanity may exist while the bodily functions are normal, or *vice versa*, is often an important factor of proof, and the more so because such conditions cannot be feigned.<sup>4</sup> A change of moral disposition is one of the

<sup>1</sup> Lunacy, as the word strictly imports, was a sort of intermittent or tidal insanity, so to speak. The deranged mind, in such cases, was supposed to be influenced by the moon, or at least the disorder was most violently manifested at recurring periods, and by regular phases. Another phenomenon attending it was that of lucid intervals, when the mind seemed to shine out brightly like the full moon emerging from a cloud when the sky is partly overcast. But the moon illustration has obviously no fitness for a great many of the milder examples of insanity, where, in fact, no violent derangement is exhibited, no periodical ebb and flow of madness, no lucid intervals when reason resumes her sway. In these latter cases a loss of intellect, feebleness of will, a perversion of tastes, habits, and character, and an incapacity, more or less marked, to apprehend the true relation of things, constitutes essentially the mental disorder. 1 Wharton & Stillé Med. Jur. §§ 61, 744.

<sup>2</sup> 1 Redf. Wills, 67, 68.

<sup>3</sup> See modes of classification stated: (1) Casper and Liman; (2) Dr. Ray, in 1 Wharton & Stillé Med. Jur. §§ 310-318.

<sup>4</sup> For instance, nervous disturbances, sleeplessness, an irregular pulse, peculiar secretions, besides which, hereditary tendency and matters of temperament, disposition, and age, and the like, call for medical attention. One's conversation and deportment, his writings, his prior history in general, all bear upon the question of sanity or insanity,

first symptoms, other than physical, with which insanity as a disease usually makes its appearance.<sup>1</sup>

105. **Now, as to wills more especially, and the testamentary incapacity of persons who are lunatics or mentally diseased;** in other words, the usual cases embraced under the head of general insanity, not congenital. While the insanity exists, the testament of such a person is not good, because every testament should be the product of a sound and disposing mind and memory.<sup>2</sup>

106. **In case of a complete restoration to normal health, the person,** being no longer *non compos*, becomes capable once more of making a will. But complete restoration is less common than a cure which leaves the faculties still impaired and liable, through feebleness of intellect, volition, or moral sense, to unsound operation and susceptible to evil influences. An intermittent insanity, moreover, is observable in some cases, not merely in the sense of a transition from insane frenzy and delirium to insane repose, but so that the mind beams out clearly once more, so to speak, from the surrounding clouds, sometimes, but not always, with a lasting radiance sufficient to disperse them.<sup>3</sup>

107. **"The term 'lucid interval' has acquired a kind of technical import in legal language."** Some eminent psychologists deny the possibility of lucid intervals, as our courts define that phrase.<sup>4</sup> But there seems no good reason to doubt that such a condition of mind may exist.<sup>5</sup>

when the observer desires to form a conclusion. So, too, the nature of the act or transaction, such as its insensibility, its incongruity, its motivelessness, and the person's apparent forgetfulness of it, his failure to profit by or escape from its consequences. All of these manifestations of insanity medical men take pains to observe in their diagnosis of a case. See 1 Wharton & Stillé Med. Jur. §§ 345-389, where this whole subject is ably treated at length from the medico-legal standpoint.

<sup>1</sup> *Ib.*

<sup>2</sup> Swinb. pt. 2, § 3; 4 Rep. 123 b; *Kemble v. Church*, 3 Hagg. 273. But, of course, a will is not revoked by the subsequent insanity of the testator. If the disease be not incurable, a state of mind may exist during which one's voluntary disposition may deserve to stand as a normal one. And the mental disease in a patient may so advance or recede that at one stage he might be called capable, at another incapable, while at any stage all the circumstances surrounding the testamentary act would deserve a patient consideration.

<sup>3</sup> For reason, when thrown from her seat, struggles almost instinctively to recover it before succumbing to adverse circumstances, as the swimmer who is swept down a current reaches out convulsively for rope or spar until despair overwhelms him. In either instance, the tenacious hold upon whatever offers may save the life or the reason, yet that hold will perhaps be lost again.

<sup>4</sup> See 1 Wharton & Stillé, §§ 744-747; 1 Redf. Wills, 63.

<sup>5</sup> Many examples, besides that of George III, serve to remind us that one who loses his reason may be restored to apparent health; and yet at some later date, perhaps not for years, relapse into clear insanity under the pressure of age or harassing ex-



108. Distinctions have been drawn between a lucid interval and the mere remission of mania. "By a lucid interval," says Dr. Taylor, "we are to understand a temporary cessation of the insanity or a perfect restoration to reason. This state differs entirely from a remission, in which there is a mere abatement of the symptoms." And again he observes, more cautiously, that nothing more is intended by lucid interval than that the patient shall become entirely conscious of his acts and capacity.<sup>1</sup> Distinctions so fine as these are hardly admissible in judicial administration. But to take the lucid interval in its wider legal acceptance, there is good ground for recognizing often a certain capacity for civil transactions, a certain responsibility in one who has been insane, even though his restoration to mental soundness at the particular stage of action, may not, upon a full review of his life, be pronounced perfect.

109. Lucid interval in the courts has no fine-drawn significance; but our legal idea is that the insane person's mind, though not positively and absolutely restored to normal health, was at least capable, at the time of the testamentary act, of performing that act, and did so with independence and intelligence sufficient to justify the conclusion that his will should be sustained as a valid one.<sup>2</sup> One lately insane who has fully recovered his reason once more may unquestionably make his will like any other person *sui juris*: but the law recognizes a mental condition less complete—one which falls short of a plain cure, and yet should be distinguished from that condition where the patient, though calm, is still insane and incapable.<sup>3</sup>

perience. This, perhaps, is drawing the line of lucid intervals more boldly than the phrase assumes; but if the bold lines are visible, the finer ones doubtless exist, though the layman cannot trace them so clearly. The lucid interval involves, in general, a restoration of reason, consciousness, and insight sufficient for performing certain intelligent acts and assuming at least a modified penal responsibility; but in the more delicate shades of the malady, medical science confesses that the mind is not entirely clear, nor is the patient quite the capable person that he was before he became insane.

<sup>1</sup> Taylor Med. Jur. 651; 1 Redf. Wills, 108, 109; 1 Wharton & Stillé, § 747.

<sup>2</sup> Here, let us observe, although the insane person himself has passed beyond mortal jurisdiction, and the issue must be determined without him, the whole range of his life and the circumstances of his death assist the diagnosis.

<sup>3</sup> "By a perfect interval," says Lord-Chancellor Thurlow, "I do not mean a cooler moment, an abatement of pain or violence, or of a higher state of torture, a mind relieved from excessive pressure; but an interval in which the mind, having thrown off the disease, had recovered its general habit." *Attorney-General v. Parnter*, 3 Brown C. C. 444; Eden's note, ib. 445; 11 Ves. 11. This figure is convenient to enable laymen to distinguish the conditions; but the definition does not, or should not, imply that one must be absolutely restored to normal soundness, for the time being, in order to make a valid testament. The faculties of the mind are indeed restored sufficiently

110. **The will of a person who was at some period insane may be established** in probate by overcoming any presumption of his incapacity; and the force of such a presumption, or its existence at all, depends upon differing circumstances.<sup>1</sup> There are English cases which sustain wills made during a lucid interval, subject to the unfavorable presumption against capacity which must first be overcome.<sup>2</sup> American cases are found of the same tenor.<sup>3</sup>

111. **But proof of a lucid interval should be clear and satisfactory.**<sup>4</sup> The standard of mental capacity which this proof should establish is the usual one favored by the later cases and set forth already: namely, capacity on the part of the testator sufficient to comprehend the condition of his property, also his relations towards the persons who are or might be the objects of his bounty, and the scope and bearing of the provisions of the will.<sup>5</sup>

112. **That the will was just and natural is a circumstance favorable to establishing a lucid interval.**<sup>6</sup>

to enable a testator to comprehend soundly the business in which he is engaged; but he may still be laboring under extreme feebleness, from the effects of the disorder; it may be highly probable, moreover, that the paroxysm, the violent symptoms, will recur; and his restoration may be to the disposing state of mind, but not to a state so healthy as before. Upon this subject of lucid intervals Bradford, Surrogate, in 1857, ruled with much force and discretion in *Gombault v. Public Admr.*, 4 Bradf. 226, 238. See also 9 Ves. 611.

<sup>1</sup> If the testator, once insane, has been restored to perfect soundness, his will deserves as favorable consideration in the court of probate as though he had never lost his reason. *Snow v. Benton*, 28 Ill. 306. But where a state of habitual insanity is shown, continuous and chronic, the presumption gathers great force that any will which such a person may have executed is tainted or discolored by his insanity, and consequently cannot operate. 1 Keen, 620, 626; *White Home v. Haeg*, 68 N. E. 568, 204 Ill. 422; 105 N. W. 377, 129 Iowa 93; *Keely v. Moore*, 196 U. S. 38, 49 L. Ed. 376. And unquestionably the state of insanity once clearly developed in the patient, there is much reason to apprehend that the disorder may again recur, though disappearing for a season. If, then, notwithstanding any adverse presumption, it can be established that the party afflicted habitually by mental unsoundness was wholly cured when he made his will, or, much less than this, that the testamentary disposition took place while there was an intermission of the disorder, or, in other words, during a "lucid interval," the will should be upheld.

<sup>2</sup> *Hall v. Warren*, 9 Ves. 611; 11 Ves. 11; 1 Jarm. Wills, 36; 1 Sw. & Tr. 401; *Nichols v. Binns*, 1 Sw. & Tr. 239. See rule in *Cartwright v. Cartwright*, 1 Phillim. 100.

<sup>3</sup> *Gombault v. Public Admr.*, 4 Bradf. 226; 21 Me. 461; 4 How. (Miss.) 459; 9 Penn. St. 151; *Gangwere's Estate*, 14 Penn. St. 417, 53 Am. Dec. 554; 1 Monr. 263; *Goble v. Grant*, 2 Green Ch. 629; *Lucas v. Parsons*, 27 Geo. 593; *Chandler v. Barrett*, 21 La. Ann. 58, 99 Am. Dec. 701; 118 La. 695, 43 So. 281.

<sup>4</sup> Such proof, it has been well observed, is extremely difficult, for this reason, among others, that a patient is not unfrequently rational to all outward appearance without any real abatement of his malady. *Brogden v. Brown*, 2 Add. 445. And see prudent observation of Sir John Nicholl in 2 Phillim. 459; 2 Russ. & M. 21, 22; 1 Keen. 620. 13 N. Y. S. 255.

<sup>5</sup> *Supra*, 68.

<sup>6</sup> The English case of *Cartwright v. Cartwright* (1 Phillim. 122) decided by Sir William Wynne and affirmed on appeal, is in point. The testatrix had early in life been afflicted with mental disorder. She afterwards was supposed to have recovered and carried

113. Other circumstances may be favorable to proof of a lucid interval; as where the testator writes his will unaided.<sup>1</sup> And various circumstances may be favorable to sustaining the will in question.<sup>2</sup>

on a house and establishment of her own like any rational person; but for several months before making her will and afterwards, many of the worst symptoms of insanity were manifested; and at the date of its execution, so wild and agitated was her manner that, when the will was offered for probate, the survivor of the attesting witnesses deposed quite unfavorably as to the sanity of the testatrix. The attending physician, it appeared, had kept his patient from using books and writing materials but yielded at last to her clamorous importunity for pen, ink, and paper, and loosened her hands, which had been tied up; whereupon she sat down in her room and wrote; tearing up several pieces of paper and throwing them into the fire, pacing the room meanwhile in a wild and disordered manner. The will was written out wholly by herself and she placed her seal to it very carefully. A reasonable inference from the whole testimony appears to have been that, impressed with the uncertainty of life and reason, she had earnestly resolved to make her will, and that such being her mental purpose, the experiment of keeping writing materials out of her reach, instead of soothing her, threw her into great agitation. At all events, the eminent judge sustained the will, remarking very properly that the court did not depend on the opinions of the witnesses but on the facts to which they deposed. The testament in question was perfectly proper and natural and conformed to what the affections of the testatrix were proved to be at the time, and her executors and trustees were very discreetly appointed. And see 77, 78, *supra*. But cf. comments in 2 Curt. 447; *Bannatyne v. Bannatyne*, 2 Rob. 472, 501; 1 Sw. & Tr. 239.

Other instances, English and American, may be adduced where the will of a person habitually insane has been sustained as the product of a clear and calm intermission or lucid interval, on proof most especially that the disposition was a just and natural one, in all respects. See 1 Dow. 178; 1 Wms. Exrs. 27; 1 Hagg. 577; *Chandler v. Barrett*, 21 La. Ann. 58; *Gombault v. Public Admr.*, 4 Bradf. 226; 118 La. 695. And there is no conclusive reason why the will of a person habitually insane might not stand under such circumstances, even though he executed it while confined in a lunatic asylum. Such was the case in *Nichols v. Binns*, 1 Sw. & Tr. 239. And see *supra*, 81; 64 A. 520, 215 Penn. 314; 31 So. 64, 106 La. 442.

On the other hand, the will of one known to be mentally unsound has been refused probate, notwithstanding circumstances of scrupulous care on his part in framing and executing the instrument, where the disposition appears to have been absurd, weak, or unnatural; as in the case of an insane person who falls indiscreetly in love with a chance acquaintance, and straightway makes his will for the sake of bestowing a generous legacy upon her. *Clarke v. Lear* (1791), cited in 1 Phillim. 90, 119. Wherever, in short, the will exhibits a decided perversion from the normal and natural disposition, thoughts, and feeling of the testator, while in his right mind, there is good reason to conclude it the offspring of insanity.

<sup>1</sup> Thus, in *Cartwright v. Cartwright*, above stated, the testatrix not only made a fair and rational will, but prepared it wholly by herself in the seclusion of her own room; and what was quite remarkable, wrote it out in a very fair hand, free from confused or absurd expressions of any kind, and without a blot or mistake in a single word or letter. 1 Phillim. 90; 112 *supra*. These facts bore strongly in favor of the testamentary act; though, had the will itself been an unjust or foolish one, the accurate handwriting might have gone for little. In *Clarke v. Lear*, *supra*, the instrument was very accurately written by the testator; and yet probate was refused. Whatever shows a careful revision or preparation of the draft by the testator himself is material in the same direction. *Mairs v. Freeman*, 3 Redf. (N. Y.) 181; *Legg v. Myer*, 5 Redf. 628.

<sup>2</sup> If the will proportions the different divisions of one's complex estate with very prudent care and a just regard to all the proper objects of one's bounty, this goes strongly towards proving, at least temporary sanity in the testator; for it shows that his mind grasps comprehensively a large and intricate subject. Moreover, if reference to the testator's intentions before his malady shows that the will was in furtherance of intentions he had declared while positively of sound mind, this may corroborate

114. A lucid interval is more easily established in cases of delirium, such as a fever or dissipation produces, or where fluctuations arise from temporary excitement or from periodicity in the attacks of the disease, than in cases of habitual insanity.<sup>1</sup>

115. Wherever the progress of mental disease was insidious and slow the proof should be well scrutinized.<sup>2</sup>

116. Doubtful instances of mental derangement consequent upon physical prostration are considered.<sup>3</sup>

117. Insanity as developed by paralysis or apoplexy is an issue to be carefully determined.<sup>4</sup>

118. Other illustrations of doubtful mental derangement, supervening upon physical prostration, are found in late reports.<sup>5</sup> Epi-

the theory of a lucid interval. *M'Adam v. Walker*, 1 Dow, 178; *Coghlan v. Coghlan*, 1 Phill. 90; *Mairs v. Freeman*, *supra*. And so, too, where the testator, subsequent to its execution makes intelligent recognition of the will and its provisions as though understanding it still to be the instrument which its face purports. This was still another circumstance shown in *Cartwright v. Cartwright*, 1 Phillim. 90. In *Gombault v. Public Admr.*, 4 Bradf. 226, the fact that the contest was between the State, claiming an escheat, on the one hand, and parties on the other, who stood to the decedent in terms of intimate confidence and affection, bore in favor of presuming a lucid interval in the testator, though the court weighed all the testimony very fairly.

<sup>1</sup> *Brogden v. Brown*, 2 Add. 445; 4 Bradf. 226, 239; *Staples v. Wellington*, 58 Me. 453. See next c. as to delirium.

<sup>2</sup> *Gombault v. Public Admr.*, 4 Bradf. 226.

<sup>3</sup> Paralysis, for instance, is sometimes a cause of mental derangement, and frequently it is not. If attended by apoplexy, or an affection of the nerves, it necessarily affects the mind; but it frequently affects only the muscles, thereby producing bodily infirmity alone, and leaving the mind unimpaired. If the patient survives the stroke for any considerable length of time, it may in general be concluded that it was simply a paralysis affecting the body only. *Hoge v. Fisher*, 1 Pet. C. C. 163.

More than this, it may be affirmed that great intellectual and physical weakness or prostration, even though accompanied by a partial failure of mind and memory, is not of itself sufficient ground for setting aside a will, if there still remains sufficient mind and memory to bring the testator within the rule of testamentary capacity which we have already set forth. *Supra*, 68. See 6 Dem. 123; 12 N. Y. S. 122. And whether this weakness or prostration arises from paralysis, or an attack of apoplexy, or heart trouble, or any other cause, the cardinal principle of testamentary capacity is always the same. See *Hall v. Dougherty*, 5 Houst. 435; *Kirsher v. Kirsher*, 94 N. W. 846, 120 Iowa 337. One might by a stroke of paralysis or apoplexy be rendered for a time unconscious and incapable of mental action; yet the mind so commonly rallies from a first shock in such cases that, should the patient months afterward make his will, habitual and continuous insanity ought not to be presumed to the disfavor of its probate. *Irish v. Newell*, 62 Ill. 196, 14 Am. Rep. 79. So, too, may it be, where one suffers great pain at times, during his last sickness. *Blake v. Rourke*, 74 Iowa, 519, 38 N. W. 392.

Where one, after paralysis, or some enfeebling disease, attends to his business and manages his property with reasonable prudence and judgment, the inference of his testamentary capacity must be very strong. See 1 Con. (N. Y.) 373.

<sup>4</sup> *Brock v. Luckett*, 4 How. (Miss.) 459 (1840), where facts outweighed medical opinions and witnesses contradicted each other. And see the proof in *Legg v. Myer*, 5 Redf. 628.

<sup>5</sup> Proof of periodical epileptic attacks, attended with convulsions, loss of consciousness and the other usual sequences of such attacks, or proof of temporary pneumonia supervening the attack with fever and delirium, is not such proof of insanity as to create a presumption of its continuance until rebutted by proof. *Brown v. Riffin*, 94 Ill. 560 (1880). And see 35 La. Ann. 160.

leptic fits are often, perhaps usually, very sudden, and in the earlier stages of the malady, more especially, one may retain his faculties to the very moment of the attack.<sup>1</sup>

119. After all, the real point at issue upon which such testimony bears, is the mental condition, the state of surrounding circumstances, at the precise time of the testamentary act.<sup>2</sup>

120. Suicide committed by the testator soon after making the will is not conclusive evidence of insanity at the time when the will was made; though as a fact in connection with other proof from which prior mental derangement might be inferred to the extent of incapacity, it should not be ignored.<sup>3</sup>

<sup>1</sup> A will has been sustained where the person having had an epileptic fit one day sent for a priest the next, and in a few minutes after executing the instrument intelligently was seized with another fit, and died a day or two afterwards. *Lewis's Will*, 51 Wis. 101 (1880). This was certainly a very close case; as there was reason for believing that the decedent was in a semi-comatose and nearly unconscious state when the will was signed; but it was drawn up, at least, under his direction. See further, *Foot v. Stanton*, 1 Deane, 19, an extreme case, where the will of a person subject to epileptic fits was admitted to probate. In *Andrews, Re*, 33 N. J. Eq. 514, the will of a woman made in the later stages of pulmonary consumption was sustained against expert testimony tending to show that medicines such as she used would affect the brain. And see *McKean's Will*, 66 N. Y. S. 44 (sustained, notwithstanding hemiplegia, Bright's disease, etc.)

<sup>2</sup> *White Home v. Haeg*, 68 N. E. 568, 204 Ill. 422 (sane when will was drawn but insane at the time of execution); *Stewart v. Lyons*, 47 S. E. 442, 54 W. Va. 665; *Dyer v. Dyer*, 87 Ind. 13 (nearly contemporaneous condition); 9 Penn. St. 151; *Gangwere's Estate*, 14 Penn. St. 417, 53 Am. Dec. 554; 16 Oreg. 127, 18 P. 6. And see 4 Bradf. 226; 4 How. (Miss.) 459; *Dole's Estate*, 81 P. 534, 147 Cal. 188.

<sup>3</sup> 1 Hagg. 109; *Duffield v. Morris*, 2 Harring. 375; *Chambers v. Queen's Proctor*; 2 Curt. 415; *Godden v. Burke*, 35 La. Ann. 160; *Koegel v. Egner*, 54 N. J. Eq. 623, 35 A. 394; *Tozer v. Jackson*, 164 Penn. 373, 30 A. 400; *Roche v. Nason*, 77 N. E. 1007, 185 N. Y. 128. The old law of forfeiture did not exclude the will of a suicide. 2 S. & T. 156.

Suicide is by no means the act of a person necessarily insane; but the murder of one's self, like the murder of another, may proceed from a sane and deliberate purpose; hence the chief value of this proof consists in the corroboration it affords in a given case, when taken with other facts and symptoms, to the theory of mental soundness or unsoundness at the date of executing the will. *Frary v. Gusha*, 59 Vt. 257, 9 A. 549. See 1 Con. (N. Y.) 510 (insane delusion shown).

## CHAPTER VII.

## DELIRIUM, DRUNKENNESS, AND DEMENTIA.

121. **What we call delirium, or the delirium of disease, is a form of mental aberration incident to fevers and sometimes to the last stage of a chronic disease. It is mostly of a subjective character, maintained by the inward activity of the mind rather than by outward impressions. But it resembles general mania or ordinary insanity so closely that the patient will often be removed to an insane asylum for treatment; and, indeed, the mental perversion which results is so nearly identical, in the two cases, that we can do little more than ascribe the delirium of disease to the march of a bodily disorder which storms the brain, and trust that as the fever subsides and health returns, the scattered senses will rally, as after a tempest, and reason reassume her supremacy.<sup>1</sup>**

122. **The will of a person, made while he is delirious and quite out of his mind, is null if not a legal absurdity. But wills are often made in the last illness of such sufferers or during the period when one throws off his feverish delirium like a person waking from a nightmare. The courts distinguish, therefore, where delirium only**

<sup>1</sup> This febrile delirium comes on gradually, as medical experts have noticed, being first manifested by talking while asleep and by a momentary forgetfulness of persons and things on waking. Fully aroused, the mind becomes calm and tranquil, and only as he becomes drowsy does the patient retire within himself again to encounter the wild troop of fantastical images which fatigue instead of resting the disordered brain. Gradually the mental disturbance becomes more intense, the intervals of consciousness diminish and then disappear, and those at the bedside may fathom to some extent from his raving, incoherent talk what apparitions his mind is contending with. The scenes and events of the past are vividly pictured; nor is it unusual at this stage for the sick to recall some lost acquirement or talk in some forgotten language. As one returns to health and consciousness, however, scenes and sensations like these, on the whole painful and exhausting, fade in vividness, the tumult of the imagination subsides, sleep is more quiet and refreshing, the judgment works out of the bewildering fancies; and as convalescence advances, the patient remembers but vaguely the stormy scene through which he has passed. 1 Wharton & Stillé Med. Jur. 3d Ed. § 702 *et seq.*

Such is the usual course of febrile delirium; but the symptoms may detach themselves, so to speak, from the bodily disorder, and assume a chronic or permanent form; in which event hallucinations are manifest. The delirium passes into the darker phase of maniacal delirium and by a fixed disarrangement of the mental conceptions produces insanity, that painful, habitual state of incapacity, whose legal consequences are elsewhere discussed. To the delirium of disease commonly succeeds a stupor, where the disease is to end fatally; but often will the mind recover a calm and quiet condition for a considerable space before death. In 1 Wharton & Stillé the distinctive symptoms are traced out, at some length, as between febrile and insane delirium.

is set up in opposition to a will presented for probate, and the case of fixed mental derangement or habitual insanity.<sup>1</sup>

123. But while delirium has usually the temporary character thus noticed, it sometimes, by changes almost imperceptible, passes, as we have seen, into the fixed type of mental derangement. And the testamentary transaction may still invite a careful inspection of all the attendant circumstances where the testator never wholly recovered from sickness.<sup>2</sup> Here, as elsewhere, the standard of testamentary capacity should be applied, and this inquiry will solve the doubt.<sup>3</sup>

124. Delirium tremens is a form of mental disorder incident to habits of intemperance, whose symptoms are generally indicated by a slight tremor and faltering of the hands and limbs, restless anxiety, disturbed sleep, and a loss of appetite.<sup>4</sup> While such delirium or derangement lasts, discretion is overwhelmed in a temporary madness, and no testamentary disposition made under its influence can avail; provided, of course, that one's mental condition fails under the tests which apply to other delirium and other forms of insanity.<sup>5</sup>

<sup>1</sup> The probabilities, *a priori*, in favor of lucid intervals are infinitely stronger in a case of delirium than in one of permanent insanity proper; and the difficulty of proving a lucid interval is less, in the same exact proportion, in the former, than it is in the latter case, and has always been so held in the English courts of probate. Sir John Nicholl, in *Brogden v. Brown*, 2 Add. 445; *Dimes v. Dimes*, 10 Moore P. C. 422, 426, *per* Dr. Lushington; *supra*, 109. There are American decisions which support the same conclusion; for delirium caused by a fever is most commonly temporary in its character, like the fever itself. *Staples v. Wellington*, 58 Me. 453, 459; *Hix v. Whittemore*, 4 Met. 545, 546; *Gombault v. Public Admr.*, 4 Bradf. 226, 239; *Clark v. Ellis*, 9 Or. 128.

<sup>2</sup> Here and at the threshold of death occurs a period when the mental condition becomes fitful and untrustworthy. The patient might be calm and answer questions with the same sort of relevancy, while a close examination would reveal, notwithstanding, a drowsy and dreamy condition of the mind, quite unfit for grappling with the relations of persons and things so as to perform with due consciousness the testamentary act.

<sup>3</sup> *Supra*, 68. See *Coughlin's Will*, 68 N. J. Eq. 582, 59 A. 876, asserting burden to establish a lucid interval, where delirium and pneumonia closely preceded death.

<sup>4</sup> As in the case of fever, uneasy slumber begets painful dreams, which pass with rarer intervals into an exhausting delirium. Refreshing sleep, aided by good medical treatment, may operate a cure, but the disease sometimes ends fatally. A more positive mental derangement is found to occur not unfrequently in connection with intemperate habits; thus, hard drinking may produce a paroxysm of maniacal excitement or a host of hallucinations and delusions; but most commonly, after a few days' abstinence, the ordinary mental condition, though feeble, perhaps, will ensue. In the lighter stages of intoxication, however, drink or some drug like opium will produce a condition of lethargy or excitement, as the case may be, which, variable by turns or temperament, steals away the faculties for the time being, and yet leaves it often very doubtful whether or not a sound and conscious mind still operated behind the mask of folly.

<sup>5</sup> The real difficulty is found where the less positive disorder of the faculties, which results from mere intoxication, has to be considered in this connection. See Wharton

125. **Drunken habits may impair the reason**, apart from a delirium. The mind becomes gradually impaired, the memory fails, and the drunkard sinks into that sottish condition where his faculties are stupefied, and he may be pronounced utterly incapable of managing his own affairs.<sup>1</sup>

126. **Intoxication does not of itself invalidate one's will**, if the intoxication or stimulus of drink or drug does not prevent him from comprehending intelligently what he is doing.<sup>2</sup> Nor is habitual drunkenness or the frequent and injurious use of ardent spirits or drugs of itself sufficient to destroy capacity.<sup>3</sup> For the state of mind at the time of executing the will in question is the material issue; and if the testator be then in a condition to understand what he is about, his capacity is to be presumed.<sup>4</sup> On the other hand, the wills of those far gone in intemperate habits should be watchfully regarded; for such persons are even more liable to imposition in transactions of this kind than to dispose irrationally without dictation.<sup>5</sup>

& Stillé, §§ 201, 639; 5 Mason, 28; 1 Curt. C. C. 1; Swinb. pt. 2, § 6. For the incapacity produced by drink is more strictly temporary than the delirium of disease, and when the fit is off, reason acts as before. 1 Redf. Wills, 163; Ayrey v. Hill, 2 Add. 206. Insanity, it is said, is often latent, but ebriety never. Ib.

<sup>1</sup> 2 Yeates, 48; Duffield v. Morris, 2 Harring, 375, 383; McSorley v. McSorley, 2 Bradf. 188. Victims of intemperance like these are, under some of our local statutes, subject to guardianship, where their estates might otherwise be squandered; for were it otherwise, testament or no testament would be of little consequence. At most, there is only *prima facie* evidence of incapacity afforded by the appointment of such committee or guardian; nor does the record always furnish even *prima facie* evidence. Lewis v. Jones, 50 Barb. 645, 57 Cal. 529; Leckey v. Cunningham, 56 Penn. St. 370. And see *supra*, 81.

Sometimes, but not invariably, a permanent, fixed, and incurable insanity is developed by the drunken habit, especially if other causes predispose the mind in that direction. But ordinarily this is not so when other predisposing causes are absent, for the mind of the most confirmed inebriate is generally capable of transacting common business in its sober moments.

<sup>2</sup> Peck v. Cary, 27 N. Y. 9; 22 Wend. 526; Pierce v. Pierce, 38 Mich. 412; 2 Green Ch. 604; Kay v. Holloway, 7 Baxt. 575, 57 Cal. 274; 49 La. Ann. 1376, 22 S. 394; 4 Dem. 501; Frost v. Wheeler, 43 N. J. Eq. 573, 12 A. 612; 127 Penn. St. 269, 18 A. 10; 45 N. J. Eq. 702, 17 A. 692. As to delirium tremens, see Edge v. Edge, 38 N. J. Eq. 211; Handley v. Stacey, 1 F. & F. 574.

<sup>3</sup> 1 Dall. 94; 1 H. & M. 476.

<sup>4</sup> 27 N. Y. 9, 84 Am. Dec. 220; 38 Mich. 412; Fluck v. Rea, 51 N. J. Eq. 233, 639, 27 A. 636, 30 A. 430; 52 A. 690; Martin v. Bowdern, 59 S. W. 227, 158 Mo. 379; Schluser's Estate, 47 A. 966, 198 Pa. 81; 55 A. 24; 205 Pa. 455; Baker v. Baker, 67 N. E. 410, 202 Ill. 595; 166 Ind. 25, 76 N. E. 755.

<sup>5</sup> If the mind is not clouded simply but actually deprived of reason or volition,—if, in other words, whether by delirium or besotted faculties, or from any other cause the person at the time of executing the will is mentally incapacitated, according to the usual tests,—his will is not a valid one. Cases *supra*; Duffield v. Morris, 2 Harring. 375; Julke v. Adam, 1 Redf. 454. What is here said of intoxication or drunkenness applies not only to the use of spirituous liquors, but to the opium or morphine habit. See Frost v. Wheeler, 43 N. J. Eq. 573, 12 A. 612; Bush v. Lisle, 89 Ky. 393, 12 S. W. 762; 52 A. 690, 64 N. J. Eq. 715.



127. **Where drunkenness is relied upon as establishing incapacity**,—not habitual and fixed insanity, but, at the most, habitual intoxication,—the burden of proving its existence at the time of executing the will rests upon the contestants.<sup>1</sup>

128. **Our courts incline to sustain a drunkard's will**, when it is just and natural and the circumstances of execution are favorable.<sup>2</sup>

129. **To speak now of dementia**, or that form of insanity which is marked by mental feebleness and decrepitude instead of mania or delirium, so that reason flickers low in the socket and then dies out. Between idiocy and dementia the analogy is strong; nor is the word "imbecility" unfrequently applied in the present connection without taking in congenital defect as a necessary element. Whether we speak of imbecility in this broad sense, or use the more technical term "dementia," we subordinate the idea of impediments which birth or infancy may have opposed to one's normal development, and view mainly the breaking down of the natural faculties, gradual and insensible, usually, but sometimes rapid and sudden.<sup>3</sup>

130. **This mental decay of the aged is known as senile dementia**; and it is upon the allegation of insanity of this kind that wills are most often contested; or rather, we should say, upon the ground that the testator, while thus weakening in intellect and volition, was, if not absolutely incompetent, unduly constrained and influenced, at all events, to make a testament which others framed for their own ends.<sup>4</sup>

<sup>1</sup> Habitual drunkenness cannot alone in proof overthrow a will. 2 Green Ch. 604, 608; Lee v. Case, 46 N. J. Eq. 193, 18 A. 525. Nor is the effect of drunkenness on the testator's capacity in such a contest a question for experts, or dependent upon proof of subsequent acts and conduct, but it depends on common observation and the facts of the particular case at and about the time of the transaction. Pierce v. Pierce, 38 Mich. 412; Gibson v. Gibson, 24 Mo. 227. All that need appear, therefore, in order to sustain the will, is the absence of intoxication, at the time of making it in any such degree as would, by the usual tests, vitiate the disposition. See Ayrey v. Hill, 2 Add. 206; 27 N. Y. 9, 84 Am. Dec. 220; 54 N. J. Eq. 623, 35 A. 394.

<sup>2</sup> See Peck v. Cary, 27 N. Y. 9, 84 Am. Dec. 220. Cf. McSorley v. McSorley, 2 Bradf. 188; 4 Dem. 501.

<sup>3</sup> But from idiocy, whose proper type is always the abnormal from birth, dementia is well distinguished; their resemblance consisting in this,—that in extreme cases, no ray of human intelligence is visible, but all is darkness. Cf. c. 5. Dementia we distinguish from general mania or delirium, in that depression of the mental powers produces the former condition, but exaltation, the latter. In mania, force, hurry and intensity mark the action of the mind; in dementia, slowness and weakness. Nevertheless, dementia appears often to be a sequel of mania, by a sort of relapse and exhaustion of nervous influence; and many regard it as the natural termination of insanity, a final period rather than a true form of mental unsoundness,—in a word the tomb of reason. 1 Wharton & Stillé Med. Jur. §§ 698, 700.

<sup>4</sup> This form of dementia invites litigation and doubt: for, unlike the dementia of the young, which is too patent to admit of question, senile dementia differs greatly both in the process and progress of decay. Medical observers tell us that it cannot

131. **Persons differ greatly both in mental and physical resources after passing the meridian of life;** some declining rapidly, others by degrees almost imperceptible. In one the intellectual functions operate with healthy precision far into the vale of years, the power of volition dominating over the ills of flesh; in another the loss of mental power and energy seems to precede the loss of physical strength; but probably in a majority of cases, both mind and body begin to fail together soon after the prime of life is reached.<sup>1</sup>

132. **The loss of memory is one of the first symptoms, as well as one of the surest,** of mental decay; and especially in respect of names and dates; yet, oblivious as an old person might appear in such matters, especially if of little personal concern to him, his mental grasp of the relations he sustains to others and of his own interests and affairs, his capacity and solid understanding, may still remain firm.<sup>2</sup> At the same time it is admitted that the faculty

be described by any positive characters; that in its gradual advance to utter incompetency it embraces a wide range of infirmity, varying from simple lapse of memory to complete inability to recognize persons or things; that often the mental infirmity of the aged is by no means as serious as might be supposed at first sight, and that, to use a figure of speech, the mind may be superficially rotted while it is sound at the core. Most of us have known some person heavily weighted with years and infirmity who seemed scarcely conscious of what was passing around him; who was quite oblivious of names and dates, and committed childish breaches of decorum before our guests; and yet, when spurred up on occasion, when encountering some object which aroused a deep interest, or, what is most pertinent to our subject, when touched upon the affairs of money, investments, and the family relation, showed a clear, acute, and vigorous comprehension. Younger members of the household watch for signs of mental failure in persons like these, and confess that often the signs deceive them. And once more, senile dementia, where the mind has surely tottered, blends so often the consequences of imprudent habits, of physical disorders seated in the system, of indulgence in drink, of some peculiar bias of character or temperament, of delusions or other predisposition to insanity, with those of natural decay in old age, that a confused array of proofs is offered by those who would break down the testament, so called, of the superannuated.

<sup>1</sup> We detect more easily when the bodily vigor and elasticity of mature life show signs of departure than we do the approach of mental feebleness; in the former respect an old person admits his lapse while he persistently deceives himself and others in the latter. Moreover our uncertainty in estimating the powers of the mind is the greater since the increase of experience and knowledge which time produces at all stages of advancing life often compensates for the decline of the mental faculties. Judges, clergymen, and literary writers, whose minds have been constantly trained and disciplined, and their circumstances such that brain work may proceed without worry, retain in many instances the capacity for intellectual labor, of the reasoning rather than imaginative sort, to a ripe old age.

The late Chief-Justice Redfield, in his valuable treatise on wills, evidently considered the imbecility of old age, or senile dementia, as the most difficult and important subject connected with testamentary capacity. 1 Redf. Wills, 94, 95.

<sup>2</sup> *Kinleside v. Harrison*, 2 Phillim. 449, 457; *Van Alst v. Hunter*, 5 Johns. Ch. 148, 158; *Bleecker v. Lynch*, 1 Bradf. 458; *Ray Med. Jur.* 336; *Merrill v. Rush*, 33 N. J. Eq. 537.

of remembering, like capacity itself, lasts much longer in some persons than in others.<sup>1</sup>

133. **The impressions of mental condition made upon casual or ignorant observers** are untrustworthy here and of very little consequence as compared with those of persons who have been well acquainted with the habits and character of the individual, and have often had occasion to test the vigor of his faculties.<sup>2</sup>

134. **Senile dementia disqualifies one from making a will, but old age alone** does not. The law places an arbitrary limit, so that those not arrived at a certain age are conclusively incapable of the testamentary act; but no such limit confronts the other extreme of human life.<sup>3</sup>

135. **The will of an aged person should be tenderly regarded,** when it appears not to have been procured by fraudulent acts, but contains those very dispositions which the circumstances of his situation and the cause of the natural affections dictated.<sup>4</sup>

136. **Various other decisions proceed upon the same view of old age** in its effect upon testamentary capacity.<sup>5</sup>

<sup>1</sup> This failure of memory is not enough to create testamentary incapacity, aside from fraud, force, and error, unless it extends so far as to be inconsistent with the "sound and disposing mind and memory" requisite for all wills; or in other words, unless the mind is incapable of grasping the details of testamentary disposition, and the memory is defective in essentials.

<sup>2</sup> The impressions, for instance, which constant medical advisers have derived, intelligent nurses, familiar visitors and friends of the family, and, allowing for the bias of personal interest, the family and immediate kindred themselves.

<sup>3</sup> Swinb. pt. 2, § 5, pl. 1.

The learned Chancellor Kent, who, as a professional instructor and author of the famous Commentaries on American Law after his enforced retirement from the bench at the age of three-score, furnishes a conspicuous example to posterity of the error legislation is sure to commit whenever it undertakes to assign an absolute limit to mental capacity for affairs and usefulness in the public service, not to add as a private citizen, made some fitting observations concerning the wills of old persons in a case which once came before him for decision. Regarding it as a fortunate circumstance for themselves that the aged have the power to dispose of their own property, "it is," he says, "one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be solitary and neglected. The control which the law still gives to a man over the disposal of his property is one of the most efficient means which he has in protracted life to command the attentions due to his infirmities." *Van Alst v. Hunter*, 5 Johns. Ch. 148, 158. See also 2 Hagg. 142; cases cited *infra*.

<sup>4</sup> Chancellor Kent in *Van Alst v. Hunter*, *Id.* But this does not apply to a will unfairly extorted by others or unjust and unnatural in its disposition of one's estate.

<sup>5</sup> "Great age alone," observes Surrogate Bradford, "does not constitute testamentary disqualification; but, on the contrary, it calls for protection and aid to further its wishes, when a mind capable of acting rationally, and a memory sufficient in essentials are shown to have existed, and the last will is in consonance with definite and long-settled intentions, is not unreasonable in its provisions, and has been executed with fairness." *Maverick v. Reynolds*, 2 Bradf. 360. "There is no presumption against a will," says Andrews, J., reiterating the New York rule on this subject, "because made by a man of advanced age, nor can incapacity be inferred from an enfeebled condition of mind or body. Such a rule would be dangerous in the extreme,

137. Instances from the reports will serve to illustrate the principle we are considering.<sup>1</sup>

138. In instances of this kind it will be found that considerations like those adduced in corresponding cases where testamentary capacity is litigated, may serve to turn the scales where doubt

and the law wisely sustains testamentary dispositions made by persons of impaired mental and bodily powers, provided the will is the free act of the testator, and he has sufficient intelligence to comprehend the condition of his property, and the scope, meaning, and effect of the provisions of the will." *Horn v. Pullman*, 72 N. Y. 269, 276 (1878). The Pennsylvania doctrine confirms the rule advanced on this point in New York, and the court makes reference in a recent case to the general test of capacity in those enfeebled by age, sickness, or extreme distress or debility of body. *Wilson v. Mitchell*, 101 Penn. St. 495; 503, citing other cases upon testamentary capacity. And see 5 *Houst.* 435.

Eminent English authority is to the same effect. "The law," observes Sir John Nicholl, "allows a person at any age to make a will, provided he retains the disposing faculties of his mind"; and he adds, that age is an uncertain criterion of mental powers. *Kinleside v. Harrison*, 2 Phillim. 449, 461. And Chief-Justice Cockburn approves the idea that though mental power be reduced in old persons below the ordinary standard, yet if the testamentary act is understood and appreciated in its different bearings, if the mental faculties retain sufficient strength freely to comprehend the transaction entered upon, the power to make a will remains. *Banks v. Goodfellow*, L. R. 5 Q. B. 549, 566.

<sup>1</sup> In a leading English case, Sir John Nicholl in 1818 admitted to probate the will and codicils of a man who had executed the latter instruments when from eighty-six to eighty-eight years old, and died at about ninety; and this notwithstanding proof that the testator had sometimes been *non compos* from violent nervous attacks while at this advanced stage of life. *Kinleside v. Harrison*, 2 Phillim. 449. In Chancellor Kent's opinion, which we have quoted, the will upheld was made by a person between ninety and one hundred years old. *Van Alst v. Hunter*, 5 Johns. Ch. 148. In a New Jersey case a will was sustained, although the testator was eighty years of age, very deaf, and troubled with defective eyesight when he made it. *Lowe v. Williamson*, 1 Green Ch. 82. And see 32 N. J. Eq. 701; *Sharp's Appeal*, 134 Penn. St. 492. In Kentucky, another testator of about the same age was so afflicted with the palsy that he could neither read nor feed himself; yet his will was adjudged a valid one. *Reed's Will*, 2 B. Mon. 79. And so with a person eighty-six years old in greatly impaired health. *Watson v. Watson*, 2 B. Mon. 74.

In one New York case a will was vigorously contested where the testatrix was ninety years old; but no proof of mental unsoundness appearing, and the will itself appearing not only a reasonable one, but in substantial accordance with one executed by her several years before, and also with her repeatedly declared intentions concerning the disposal of her property, and made after being carefully read and explained, the will was established. *Maverick v. Reynolds*, 2 Bradf. 360. In another case the court of appeals sustained the will of a widower, eighty-three years old, which gave the bulk of his estate to a grandson who had taken good care of the testator during his declining years, and bestowed only five dollars each upon six adult children, who, though on friendly terms with their father, had seldom visited him in his old age, and had declined to let him live with them. *Horn v. Pullman*, 72 N. Y. 269. And in Pennsylvania the will of an old man was adjudged good though he was more than a hundred years old when he made it; blind, partly deaf, and weakening in his memory. *Wilson v. Mitchell*, 101 Penn. St. 495. See further, 4 Dem. 501 (where the testator was eighty years old and a hard drinker); 98 N. Y. S. 438 (ninety-six years old); 33 N. J. Eq. 219, 537; *Silverthorn's Will*, 68 Wis. 372, 32 N. W. 287; 72 Iowa, 515, 34 N. W. 309; 143 Mo. 348, 44 S. W. 1117; 144 Mo. 354, 45 S. W. 1077 (where the testator was eighty-three years old, and sometimes used drugs); *Cash v. Lust*, 142 Mo. 630, 44 S. W. 724, 64 Am. St. Rep. 576; *Pooler v. Cristman*, 145 Ill. 405, 34 N. E. 57; 46 A. 424; 196 Penn. 194.

exists. The will is just and reasonable, or at least not positively the reverse; it regards the natural claim of family and kindred, if there be such; it was read over and explained, or at least was apparently well understood at the time of execution; it was carefully executed.<sup>1</sup> General prudence and good sense in the management of one's own business affairs and consistent affection, are of course strong circumstances for upholding the wills of the aged.

139. **Extreme old age suggests vigilance in probate;** and a tender regard for the aged requires not only that their intelligent dispositions should be upheld, but that their unintelligent ones, or wills not really their own, should be set aside.<sup>2</sup> There can be no question that mental imbecility, whether arising from old age or any other cause or complication of causes, destroys testamentary capacity. And undue influence, especially such as constrains by causing fear, must be regarded with great disfavor in all instances under the present head.<sup>3</sup>

140. **Wills of the aged have been refused probate in various instances.**<sup>4</sup>

<sup>1</sup> Wherever it appears that the testator, while clearly competent, gave instructions for such a will, or otherwise showed by conduct prior or subsequent to the execution that the disposition in question was such as he and not others deliberately planned, this circumstance should bear very strongly in favor of the probate. See e.g. *Maverick v. Reynolds*, 2 Bradf. 360; *Merrill v. Rush*, 33 N. J. Eq. 537.

If the aged person has no near kindred at all, no persons with natural claims upon him, his bounty may naturally be directed to other persons or objects. See *Wood's Estate*, 13 Phila. 236; *Lewis, Re*, 33 N. J. Eq. 219. It matters little that the testator judged harshly of a person, if that person had no natural claims upon the testator's bounty. *Lewis, Re*, 33 N. J. Eq. 219. Harsh conduct, as establishing an insane delusion in the testator's mind, will be treated in the next chapter.

<sup>2</sup> *Kinleside v. Harrison*, 2 Phillim. 449, 461. There is no presumption against a will simply because of old age. *Horn v. Pullman*, 72 N. Y. 269. See *White v. Starr*, 47 N. J. Eq. 244, 20 A. 875.

<sup>3</sup> *Hartmann v. Strickler*, 82 Va. 225; 43 N. J. Eq. 154; c. 10, *post*. Lunacy or mental unsoundness previously existing raises, of course, a prejudice. See 10 Moore P. C. 278; 61 N. Y. S. 1014.

<sup>4</sup> In Kentucky the alleged will of a man about seventy years, who was confined to his bed by an inflammatory disease of a very distressing sort, which made him frequently both drowsy and flighty, and died two days later, was refused probate; and this largely, as it would appear, because the will showed gross inequality in its dispositions, and was only made after the teasing importunities of the testator's wife. *Harrel v. Harrel*, 1 Duv. 203. In Missouri was set aside an instrument propounded as the will of an old lady about seventy-three years of age who had grown childish and irritable; not so much, however, on the ground of incapacity, as because a stranger in blood, who had acquired a strong influence over her, procured the will in his own favor regardless of her own immediate relations, who were all poor: *Harvey v. Sullens*, 46 Mo. 147, 2 Am. Rep. 491. And in a New Jersey case, where one made a sudden, unjust, and unaccountable change of disposition, evidence that he was eighty years old, that he had suffered in his mind from sunstroke, that he had had delirium tremens, that he was under a delusion that his wife and son (with whom the will dealt inequitably) were trying to kill him, and that other persons were trying to rob him,—all this was held satisfactory proof of his testamentary incapacity. *Edge v. Edge*, 38

141. **In fine, the rule of capacity here is not different from other cases of alleged mental unsoundness.** Although the testator was aged and infirm, his will as a rule may be established, if, at the time of making it, he had sufficient intelligence to comprehend the business in which he was engaged, the condition of his property and his relations to those who were or might naturally be the objects of his bounty.<sup>1</sup>

142. **Little weight attaches to the mere opinion of witnesses, where the testator is far advanced in years, and occasional incapacity is produced by sickness, intemperance, or other cause, so that the case is a complicated one, and the evidence crude and contradictory.**<sup>2</sup>

N. J. Eq. 211. Stupor and forgetfulness of the aged person at the time of execution, are unfavorable circumstances, especially if sinister agencies are shown to have been active in procuring the testament, and death soon intervened after the instrument was executed. See *Cockrill v Cox*, 65 Tex. 669; 115 Ill. 11, 3 N. E. 738; 80 Va. 293; 89 Va. 849, 17 S. E. 515. Mental impairment by apoplectic shocks or paralysis may also be shown. *Hudson v. Hughan*, 56 Kan. 152, 42 P. 701; *Bever v. Spangler*, 93 Iowa, 576, 61 N. W. 1072; *Mendenhall v. Tungate*, 95 Ky. 208, 24 S. W. 431; *Davis v. Denny*, 50 A. 1037, 94 Md. 390 (childish with loss of memory).

<sup>1</sup> *Supra*, 68; *Wilson v. Mitchell*, 101 Penn. St. 495, 503, and other cases cited, 135-140; *Gilman v. Ayer*, 52 A. 1131, 63 N. J. Eq. 806; *Elliott v. Elliott*, 92 N. W. 1006, 3 Neb. (unoff.) 832; *Perkins v. Perkins*, 90 N. W. 55, 116 Iowa, 253; *Reed's Estate*, 90 N. W. 319, 86 Minn. 163; *Riggin v. Westminster College*, 61 S. W. 803, 160 Mo. 570; *Butler's Will*, 85 N. W. 678, 110 Wis. 70; *Chandler's Will*, 66 A. 215; 102 Mo. 72; 115 N. W. 236, 137 Iowa, 613; 180 Ill. 9, 54 N. E. 217 (ninety-one years old); 98 N. Y. S. 438 (ninety-six years old).

<sup>2</sup> The basis of such opinions is liable to vary exceedingly; and, moreover, differences will arise from the different abilities of the witnesses to form such opinions, from their different opportunities of seeing the person, and from the different state and condition of the testator's mind at different times. *Kinleside v. Harrison*, 2 Phillim. 449, 457. Especially does this hold true of casual and unskilful observers; for, as already shown, it is only those well acquainted with the patient and his idiosyncracies whose impressions at this stage of his life can be trusted. *Supra*, 133.

## CHAPTER VIII.

## MONOMANIA AND INSANE DELUSIONS.

143. **Monomania is the present name applied to that type of insanity which remains finally to be considered.<sup>1</sup>**

144. **Monomania, so called, may consist in mental or moral perversion, or in both, but it is the former phase which is chiefly presented in cases where the issue of testamentary capacity is involved. We may here define it as insanity only upon some particular subject or class of subjects; and as insanity in general is manifested by delusions, so in the present connection there appears in strictness but a single insane delusion, an insanity upon some particular subject or class of subjects, while in other respects the mind appears to retain its normal powers.<sup>2</sup>**

<sup>1</sup> "Partial insanity" was the term formerly applied, by way of distinguishing it from general derangement of the mind; but the best of modern medical psychologists now repudiate that mode of distinction as artificial, one which leads, moreover, to lax and pernicious theories upon the subject of moral responsibility. The individual mind, they teach us, is properly regarded at all events, as a unit and indivisible; not with moral and mental functions lodged in separate cells; nor with subdivided cells for various mental faculties, all capable of working apart and independently of one another. Wharton & Stillé Med. Jur. §§ 567-571.

If this later exposition be the true one, not only "partial insanity," but "moral monomania," with its confusing list of crimes which should be pitied but not punished, falls into disrepute. Nevertheless, the word "monomania" in an intellectual sense, and as applied to testamentary instruments, holds its footing in the courts. Even "partial insanity" might be quite as unobjectionable a term, were it under like limitations. See *Dew v. Clark*, 1 Add. 279; 3 Add. 79; *Waring v. Waring*, 6 Moore P. C. 349 (criticisms upon "partial insanity").

<sup>2</sup> A delusion in medical jurisprudence is "a diseased state of the mind in which persons believe things to exist, which exist only, or to the degree they are conceived of only, in their own imaginations, with the persuasion so fixed and firm that neither evidence nor argument can convince them to the contrary." Bouv. Dict. "Delusion"; *Robinson v. Adams*, 62 Me. 369, 401, 16 Am. Rep. 473. "The correct principle is, that whenever a person imagines something extravagant to exist, which really has no existence whatever, and he is incapable of being reasoned out of his false belief, he is in that respect insane; and if his delusion relates to his property, he is then incapable of making a will." *Benoist v. Murrin*, 58 Mo. 307, 323.

It is misleading and inaccurate to use insanity and delusion as convertible terms; for there are delusions which sane minds have entertained; while in that decaying state of the intellect known as dementia, or in imbecility, the insane mind is often too feeble to manifest delusions of any appreciable consequence at all.

Insane delusion is sometimes thought to consist essentially in believing that to be true or to exist, which no man in his senses can admit. But any standard for comparison of the average man in his average range of mind is far from fixed and positive. Men have been thought under an insane delusion who saw clearly in advance of their age; and it is not so long since that any one who believed it possible for persons in cities far apart to hold oral converse by means of electricity would have been set down by the mass of his fellow-men as a monomaniac. The world itself is deluded

145. As between insanity and eccentricity, the latter is traced down as a natural and gradual growth of habits and character in an individual under the peculiar influences which surrounded him.<sup>1</sup> External causes account for eccentric but not for insane behavior.<sup>2</sup>

146. The essence of an insane delusion is that it has no basis in reason, and cannot by argument or evidence be dispelled in the slightest. It is thus capable of being cherished side by side with other ideas utterly inconsistent with it.<sup>3</sup> The term "delusion" as applied to insanity must be distinguished from a mere mistake of fact, or being induced by false evidence to believe that a fact exists which does not exist, or deducing incorrectly from actual facts. There can be no insane delusion that has any evidence for its basis.<sup>4</sup>

by its own imperfect experience of things, by errors, by superstition, by dreams. A morbid state of mind, a strange perversion on particular subjects, is, nevertheless, to be detected frequently in some individuals; it is a symptom often of general derangement soon to follow; or, again, it remains fixed as the last discoverable symptom, after some mental disorder of greater scope appears to have passed away.

It is generally admitted that the degrees of morbid derangement, of so-called monomania, vary very greatly in particular cases; one person showing great sagacity and mental acuteness on all subjects out of the range of his peculiar infirmity, while another has well-nigh lost altogether the balance of his faculties. But, while some who are less affected seem to conceal their delusion from the world with considerable skill and art, the monomaniac more commonly shows himself quite unconscious that his particular hallucination separates him from the mass of mankind and provokes the comment that he is crazy. This it is, as reputable writers assert, which most distinguishes monomania from eccentricity or any mere oddness of opinion; for the odd or eccentric man admits his peculiarity, but persists in his course from choice and in defiance of public sentiment, while one laboring under the insane delusion admits neither error nor singularity on his part, but seems persuaded that he is guided by the most judicious of counsel. His insanity puts on the aspect of a sort of supernatural sanity, and by this is most easily detected. Yet, even here, how liable it is to happen that where one pursues some mistaken fancy, or delusion, but not an insane one, the more he insists that he is rational, the more are others misled to believe that he is out of his mind, and an indignant denial of insanity is taken as proof positive of derangement until a mutual explanation reveals the false premises upon which his course of action was based. *E.g.* Malvolio in "Twelfth Night."

<sup>1</sup> When the will of such a person is opened, no matter how odd its language or how whimsical its provisions, those familiar with the person pronounce it just such a document, nevertheless, as might have been expected from him. But the will of an insane person, on the other hand, shows rather a perversion of mind, an alienation of feeling, astonishing, unaccountable, and strangely at variance with his natural character while in sound health.

<sup>2</sup> A person may be eccentric, and so predisposed to insanity as to become decidedly deranged at some periods of life, and yet at other times so remitted to the former state of mere eccentricity as to be pronounced capable of making a will. See *Mudway v. Croft*, 3 Curt. 671, 678; *Wright's Estate*, 51 A. 1031, 202 Penn. 395; *Medill v. Snyder*, 58 P. 962, 61 Kan. 15, 78 Am. St. Rep. 306.

Eccentricity involves a greater susceptibility than usual to mental derangement; but still it is not mere strangeness of conduct or singularity of mind which constitutes the presence of insanity. "It is the prolonged departure, without an adequate external cause, from the state of feeling and modes of thinking usual to the individual when in health, that is the true feature of disorder of mind." *Mudway v. Croft*, *ib.*

<sup>3</sup> *Merrill v. Rolston*, 5 Redf. 220, 251; *Florey v. Florey*, 24 Ala. 241.

<sup>4</sup> See 162, 215, *post*.



147. **Delusions of one kind or another are the usual accompaniment of a deranged mind**; and the courts have sometimes been disposed to test one's general sanity by ascertaining whether he exhibits delusions. But what we call delusions afford a very capricious standard in their legal relations, as concerns testamentary capacity.<sup>1</sup>

148. **It is not given us to solve those mysteries in which a mind of strong imaginative powers** and quick susceptibilities, prone to morbid depressions, may become involved, under the influence of superstitious training, long habits of self-introspection, or any such strange experience of life as gives to the character an eccentric development. But surely, many of the delusions, hallucinations, apparitions, by whatever names we may choose to call them, manifested in these and other minds, come very far short of establishing their incapacity for the usual transactions of life.<sup>2</sup>

<sup>1</sup> Sir J. P. Wilde (Lord Penzance) in 1867 criticised severely the current definitions of English courts on the subject. A delusion is "a belief of facts which no rational person would have believed:" so spoke Sir John Nicholl. "But who," asks Sir J. P. Wilde, "is a 'rational' person? And does not the assumption 'rational' beg the question at issue?" "The belief of things as realities, which exist only in the imagination of the patient"; so said Lord Brougham in *Waring v. Waring*; but do not sane people imagine unrealities? "A pertinacious adherence to some delusive idea, in opposition to plain evidence of its falsity," said Dr. Willis, as quoted by Sir John Nicholl; "but are not sane people sometimes pertinacious in error? and who is to determine what evidence is 'plain'?" And arguing hence from the inadequacy of all the definitions, Sir J. P. Wilde concluded that delusions, as *insane* delusions, ought to be proved by insanity, not insanity by delusions. *Smith v. Tebbitt*, L. R. 1 P. & D. 401. A later probate judge of that country admits that to test delusion by what "no rational person would have believed" is arguing in a circle, yet he considers that test a good one for practical purposes. *Boughton v. Knight*, L. R. 3 P. & D. 64. It is sometimes assumed that a delusion, to be pronounced insane, must have been combated, so that it appears in fact, not only against just reason but against argument or evidence adduced to the contrary. *Kendrick's Estate*, 62 P. 605, 130 Cal. 360. And see *Stull v. Stull*, 96 N. W. 196, 1 Neb. (unoff.) 380; *Hemingway's Estate*, 45 A. 726, 195 Penn. 291, 78 Am. St. Rep. 815.

<sup>2</sup> An overtaxed mind tending to disease and disorder is often thus shown, to be sure; but the strain may be temporary only, and the delusion never strong enough to unseat reason or pervert the mind from its proper functions or the great task with which it wrestles. Macbeth's dagger and the ghost which appeared to Brutus before the battle are familiar among the countless examples in fiction; and for veritable history one need only refer to modern apparitions, in which men like Dr. Johnson, Lord Castle-reagh, and President Lincoln believed, whose testamentary capacity it would be preposterous to dispute; or the star of destiny by which Napoleon guided his conduct at a momentous crisis. See 1 Wharton & Stillé, §§ 52-57. The delusion may give friends cause for anxiety; but the mind, when tested, is shown quite capable of making a will or managing vast affairs.

But there are other cases in which a general morbid derangement of all or most of the organs must be admitted to exist. To these, and to the great mass of instances like those already cited, Dr. Wharton, an excellent authority among medical jurists, applies with strong approval the observations of De Boismont, as to the will of a man who supposed that he had sunk all his wealth at the bottom of a well. De Boismont cited 1 Whart. & Stillé Med. Jur. § 58.

149. **Mere whimsical behavior, or eccentricities in dress, demeanor, and habits of life,** constitute, therefore, no incapacity to make a will or to perform any other property transaction. Isolation from social companionship engenders usually peculiarities in this direction; and the unmarried or disunited of both sexes, those whose homes have been broken up, and who find no close domestic bond such as smooths off the angles and rough edges of individual character by constant attrition, are the most prone to develop them.<sup>1</sup>

150. **But while the distinction between eccentricity and insanity is a positive one,** abstractly considered, courts have not in all cases applied it with marked success.<sup>2</sup>

<sup>1</sup> See *Boughton v. Knight*, L. R. 3 P. & D. 64; *Pilkington v. Gray*, (1899) App. Cas. 401; *American Bible Society v. Price*, 115 Ill. 623, 5 N. E. 126; 121 Ill. 376, 12 N. E. 267; 6 Dem. 123; 145 Mo. 432, 46 S. W. 955; *Cash v. Lust*, 144 Mo. 354, 45 S. W. 1077. One may be eccentric, peculiar, slovenly in his conduct, conversation, personal habits and attire, and yet be capable of making his will. *Knight's Estate*, 167 Penn. St. 453, 31 A. 682. And see *Prentiss v. Bates*, 88 Mich. 567; 56 N. J. Eq. 766, 41 A. 422; *Wright's Estate*, 51 A. 1031, 202 Penn. 395; 27 App. D. C. 535; *Morse v. Scott*, 4 Dem. 507.

<sup>2</sup> There are recorded instances where wills have been refused probate in the English ecclesiastical courts because the testator during life or in the testamentary act showed a disgusting fondness for brute animals. In one case the testatrix, who was a spinster, kept fourteen dogs of both sexes, who were provided with kennels in her drawing-room; in another, a solitary female befriended a multitude of cats, which were provided with regular meals and furnished with plates and napkins. *Taylor Med. Jur.* 658, citing *Yglesias v. Dyke*, Prerog. Court, 1852. That affection which sets domestic creatures like these above the human kind can hardly be called a natural one, and yet it is not hard to comprehend how a heart whose natural yearnings find no response may expend itself upon the lower animals. The Arab loves his horse, and prisoners of state have, in their solitude, made pets of rats and vermin. The lowest of the brute creation is capable of touching the human chord as well as gratifying a scientific curiosity. One might have expected, then, to find the whimsical attachment of such females pronounced the sign not so much of insane as of merely eccentric behavior, unless, indeed, the will passed coldly by those whose human claims for sympathy should have had the first place in such a disposition.

On the other hand, there is a remarkable case in which a man's will was sustained, as that of an eccentric, not insane person, which not only disinherited the next of kin in favor of a stranger, but displayed a wholly irreverent contempt for the *post mortem* disposition of the testator's own body, such as might shock the most benighted of heathen savages. He directed his executors to cause some parts of his bowels to be converted into fiddle strings, others sublimated into smelling salts, and the remainder of his body vitrified into lenses for optical purposes; and in a letter attached to the will he said: "The world may think this to be done in a spirit of singularity or whim; but I have a mortal aversion to funeral pomp, and I wish my body to be converted into purposes useful to mankind." *Morgan v. Boys*, *Taylor Med. Jur.* 657; cited 1 Redf. Wills, 82 (disapproving). One might have wished this will refused probate, with its disinheritance of heirs, if only to rebuke the offensive zeal which, sanely or insanely, vaunted in a Christian country so flippant a disposition of person and property. But the letter above quoted showed a conscious defiance of public opinion only to be expected from a rational mind; and as the testator himself was shown to have conducted his affairs in life with great shrewdness and ability, and to have been universally regarded by his associates as a man of sound capacity, the court pronounced him eccentric and not deranged upon the proof, and admitted the will.

151. But in the matter of funeral and burial, differences of education and habits of thought may unquestionably produce tastes and customs utterly dissimilar.<sup>1</sup>

152. Eccentric habits may afford proof of insane delusion, when taken in connection with other facts and circumstances pointing to the same conclusion. Especially is this true where the eccentricity together with the delusion follows mental prostration or develops in some strange, sudden, and unaccountable mode, instead of growing as habits usually do.<sup>2</sup>

153. When we come to the more serious disorder known as **monomania**, which throws great doubt upon the sufferer's capacity for affairs, the insane delusion on some particular subject is the symptom most prominent; and yet weakness or derangement affects probably the mind as an entirety. The understanding will be found perverted in regard to a single object, or a limited series of objects.<sup>3</sup>

154. The illusions or false impressions of the monomaniac have a reference to himself almost always if not invariably; at

Yet it would be hard to say why tenderness for the brute creation should be thought a sign of unnatural perversion, and contempt for one's own body (and presumably for all human bodies) should not.

<sup>1</sup> Thus, shocking as it may seem to many of us to have the corpse deliberately burned instead of buried, there are those who, with deliberate thought and even enthusiasm, embrace lately the doctrine of cremation. A will which gives such a direction is by this date hardly even eccentric. And in details less repulsive, but sounding rather in extravagant folly, the religious views, the personal experience, the habits, associations, and superstitious surroundings of the testator during his life may throw such light upon his directions as wholly to remove the suspicion of insanity. A testator, who was a native of England, but had lived long in the East and professed the Mahometan faith, directed that the residue of his estate, after paying specified legacies, should go to the poor of Constantinople, and towards erecting a cenotaph in that city, inscribed with his name, and bearing a light to be kept perpetually burning. It was an absurd and superstitious will, when tested by opinions and habits of thought prevalent in England, for which reason the Prerogative Court condemned it as the offspring of insanity; but on appeal the will was admitted to probate. *Austen v. Graham*, 29 E. L. & Eq. 38. In this case no natural claims appear to have been seriously impaired.

<sup>2</sup> *Miller v. White*, 5 Redf. 320, affords a good illustration in point.

<sup>3</sup> Solitary life, or the oppression of some particular task or problem, upon which the brain has long revolved, is likely to have induced this deranged condition from a morbid one; and hence eccentric habits often precede or accompany the disorder. This derangement, which we call monomania, admits of infinitely fine gradations. Nothing leads more naturally to the disorder than the experience of a mind of active but ill-attuned faculties, which has been thrown back upon itself from some cause without the sure prop of external sympathy; and in its most decided manifestations it is selfish, and morbidly rejects the natural companionship. It would appear, too, that the person thus afflicted may retain a sufficient power of will to restrain his expressions of aversion, and conceal the real depth of his delusion. See *Prichard's Insanity*, cited in *Smith v. Tebbitt*, L. R. 1 P. & D. 422. See also Dr. Hammond's tract on *Insanity*, quoted in 1 Whart. & Stillé, § 60, note.

some times they relate to his fortune, rank, or personal identity; at others, to his health of body and his sensations.<sup>1</sup> And it is matter of common note that persons so deranged fancy themselves kings or emperors, prophets or popes; far in dignity above the common herd of mankind.<sup>2</sup>

155. **Whether to set a will aside or not on the ground of monomania**, or some particular mental delusion, should be tested according to the English rule long settled, by ascertaining whether or not the will appears to have been the direct, unqualified offspring of the morbid or insane delusion. But in 1848, in a remarkable case Lord Brougham, to assail a former dictum of "partial insanity," boldly took ground against the notion that there could be insanity on one point as consistent with testamentary capacity.<sup>3</sup> At first it was inferred by many that a new doctrine had been introduced into English jurisprudence, a new constraint placed upon testamentary capacity in doubtful cases; and the danger was great that eccentric testators would lose whatever precarious foothold they had ever gained in courts of probate jurisdiction.<sup>4</sup>

156. **But since 1870 the English courts have repudiated expressly the hypothesis** of Lord Brougham, and returned to the old ground. Chief-Justice Cockburn, a man of vigorous powers, who always regarded the substantial justice of the cause which his court was called upon to decide, reviewed the whole subject in a masterly manner, and reached this satisfactory result: that delusions, arising from mental disease, which are not calculated to prevent the exercise of those faculties essential to the making of a will, nor to interfere with the consideration of the matter which should be weighed on such an occasion, and which delusions have not in point of fact influenced the testamentary disposition in question, are not sufficient to deprive the testator of testamentary capacity and to invalidate his will.<sup>5</sup>

<sup>1</sup> Prichard, cited in L. R. 1 P. & D. 422.

<sup>2</sup> *Dew v. Clark*, 1 Add. 279, 3 Add. 79; 5 Russ. Ch. 163 (appeal).

<sup>3</sup> *Waring v. Waring*, 6 Moore P. C. 349. See this opinion or brilliant essay at length. Lord Brougham was a man more famous for versatile attainments and ingenious speculation than for the judicial temper.

<sup>4</sup> In *Smith v. Tebbitt*, Sir J. P. Wilde, in 1867, made Lord Brougham's hypothesis the starting-point of his own investigation. "A person," he observed, "who is affected by monomania, although sensible and prudent on subjects and occasions other than those upon which his infirmity is commonly displayed, is not in law capable of making a will." *Smith v. Tebbitt*, L. R. 1 P. & D. 398.

<sup>5</sup> *Banks v. Goodfellow*, L. R. 5 Q. B. 549. The opinion in this case deserves a careful reading. Unlike the cases, beginning with *Waring v. Waring*, which had ruled otherwise, this was an instance where it was really just to the testator's memory that the will in controversy should be sustained. The opinion itself, which the Chief-Justice

157. **Passing from English dictum to decision, we find no great discrepancy;** principles having been disputed more broadly than the facts of a given case required.<sup>1</sup>

158. **The later English decisions favor substantial justice still,** as their facts and circumstances show.<sup>2</sup>

personally prepared, contained cautious reservations indicating that, as concerned the human mind in the unity of its functions, he accorded with the views advanced by Lord Brougham and the best of modern psychologists.

Sir James Hannen, one of the court responsible for the decision in this case, took occasion to commend Lord Cockburn's views somewhat later, when charging a jury as Judge Ordinary where another will was opposed at the probate on the ground of insane delusion. *Boughton v. Knight*, L. R. 3 P. & D. 64. And see *Smee v. Smee* 5 P. D. 84 (1879). Such, then, is the posture of English judicial opinion on this difficult subject at the present time.

<sup>1</sup> To begin with *Dew v. Clark*, decided about 1823. An eminent electrician had an only child, a daughter of amiable traits, and worthy of his affection; and after experimenting most cruelly to bend her to his wishes, and explore those unuttered thoughts which are confided by the human soul to its Maker alone, he displayed against her an uncontrollable disgust and aversion, oppressing her in various ways, and finally making a will which cut her off in favor of his collateral relations. Upon the evidence submitted, John Nicholl found that the testator was insanely deluded upon the subject of his own child, and refused the will probate. 3 Add. 79; 1 ib. 279; 2 ib. 102.

In the opinion here rendered, reference is made to the authority of *Greenwood's Case*, which, as it seems, was never fully reported, though stated somewhat in detail in various books. 3 Add. 96, 97. The suit ended in a compromise.

In *Waring v. Waring*, a case whose decision required no different mental hypothesis such as Lord Brougham saw fit to promulgate, the testatrix, a woman advanced in years, was very penurious, irritable, wrangled to an excess with her servants, and at times indulged in grossly obscene conversation, imagining herself to be amorously sought by the chief ministers of the realm. All this perhaps might have passed for eccentricity; but it was shown, besides, that she had an insane delusion that her brother had joined the Catholics, whose religion she abhorred, and like her distinguished lovers prowled about her house in strange disguise; and that brother she disinherited. Coupled as all this was with an inquisition of lunacy, it was easy to pronounce against her will, upon any theory of insane delusion. 6 Moore P. C. 349.

Once more, in *Smith v. Tebbitt*, the will of a testatrix was set aside whose religious delusions were astounding. Her deceased husband was the "devil," for whom she would not go into mourning; her heirs-at-law were "doomed to perdition." She had a tiara of jewels made in which she was to ascend to heaven; she believed herself "the Holy Ghost," and her medical adviser "the Father"; and to the latter, a stranger in blood who had rendered her no unusual service, after providing sundry legacies for relatives, servants, and others, she willed the great bulk of her fortune as the gift of "one member of the Trinity" to another. *Smith v. Tebbitt*, L. R. 1 P. & D. 398.

<sup>2</sup> In *Banks v. Goodfellow*, the Chief-Justice and Queen's Bench refused to sanction a positive injustice upon any plea of theoretical consistency. In the former instances there was an inofficious will to be set aside, here there was none. Before, the partial unsoundness of mind, or rather the monomania, operated upon the particular disposition injuriously to the natural objects of the deluded person's bounty; now it did not. Two delusions disturbed here the mind of the testator: one, that he was pursued by spirits; the other, that a man, long since dead, came personally to molest him, this dead man a person not in any way connected with the natural objects of the testator's bounty. The will in dispute might well have been the product of a capable mind; and, admitting that the testator was sometimes incapable, the issue of actual capacity at the time of the act had been left to the jury under instructions sufficiently guarded. The jury found for the will, which was one in favor of the testator's niece; and as the will was not unnatural, nor the testator's delusions such as could have influenced the disposal of his property, the court on appeal refused to disturb the verdict. L. R. 5 Q. B. 549.

159. In American cases under the present head, the influence of monomania or insane delusion appears to have afforded a wider scope for investigation. Here the doctrine of testamentary capacity as understood in England prior to 1848, and once more favored in 1870 by the court of Queen's Bench, is firmly adhered to.<sup>1</sup> The notion to which Lord Brougham gave currency, that a single delusion lurking in the testator's mind should vitiate his will (though not apparent in the will itself) because it proves him insane, is pointedly condemned by eminent judges in various States;<sup>2</sup> and the point of inquiry upon which testamentary cases of this character invariably turn is, whether the insane delusion, the monomania, entered into the product of the particular will in dispute. In other words, where general insanity so as to wholly incapacitate is not apparent, but simply monomania, the court will admit the will to probate where, upon the whole proof, the conclusion reached is that the provisions of the will were not influenced by the insane delusion;<sup>3</sup> but where, on the contrary, it should fairly be inferred that the instrument was tainted by the insane delusion, probate will be refused.<sup>4</sup> Not an American case of consequence has departed

Once more, in *Boughton v. Knight*, the testator's will was set aside because of an insane delusion which operated injuriously against his own flesh and blood. In this case Sir James Hannen stated, with great positiveness of expression, that there is a limit to sustaining wills whose provisions are unjust and unnatural. A man moved by capricious, mean, or even bad motives may at our law wholly or partially disinherit his own children and leave his property to strangers; but there is a point beyond which it will cease to be a question of harsh and unreasonable judgment, and then the repulsion which a parent exhibits to his child must be held to proceed from some mental defect; and if such a repulsion, amounting to a delusion, is shown to have existed prior to the execution of the will, the party who propounds that will must show that it was inoperative when the will was made. *Boughton v. Knight*, L. R. 3 P. & D. 64; and see *Smee v. Smee*, 5 P. D. 84.

<sup>1</sup> *Supra*, 156.

<sup>2</sup> See *Dunham's Appeal*, 27 Conn. 192, 204; *State v. Jones*, 50 N. H. 396, 9 Am. Rep. 242; *Benoist v. Murrin*, 58 Mo. 307; 179 Ill. 45; 53 N. E. 722.

<sup>3</sup> *Boardman v. Woodman*, 47 N. H. 120; 136 Mass. 145; *Clapp v. Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681; *Hollinger v. Syms*, 37 N. J. Eq. 221; *Blakely's Will*, 48 Wis. 294, 4 N. W. 337, 2 McCart. 202; *James v. Langdon*, 7 B. Mon. 193; *Gass v. Gass*, 3 Humph. 278; *Cole's Will*, 49 Wis. 179, 5 N. W. 346; *Rice v. Rice*, 50 Mich. 448, 15 N. W. 545; *Thompson v. Quimby*, 2 Bradf. 449; s. c. as *Thompson v. Thompson*, 21 Barb. 107; 3 Wall. Jr. 120; 53 Md. 376; 36 Am. Rep. 422; *Maynard v. Tyler*, 168 Mass. 107, 46 N. E. 413; *Johnson v. Johnson*, 105 Md. 81, 121 Am. St. Rep. 570, 65 A. 918; *Robinson v. Adams*, 62 Me. 369, 16 Am. Rep. 473.

<sup>4</sup> 8 Watts, 70; *Seaman's Friend Society v. Hopper*, 33 N. Y. 619; 43 Barb. 625; 24 Ga. 640, 71 Am. Dec. 147; 24 Ala. 241; 16 Barb. 259; 5 Redf. 220; 76 Penn. St. 106; *Gardner v. Lamback*, 47 Ga. 133; *American Bible Society v. Price*, 115 Ill. 623; 5 N. E. 126; *Chaney v. Bryan*, 16 Lea, 63; 45 N. J. Eq. 726, 17 A. 826; 6 Dem. 92; *Shreiner's Appeal*, 178 Penn. St. 57, 35 A. 974; 170 Penn. St. 272, 50 Am. St. Rep. 770, 33 A. 81; *Cotton v. Ulmer*, 45 Ala. 378, 6 Am. Rep. 703; *Lancaster v. Lancaster*, 87 S. W. 1137, 27 Ky. Law 1127; *Hardenburgh v. Hardenburgh*, 133 Iowa, 1, 109 N. W. 1014; *Holton v. Cochran*, 208 Mo. 314, 106 S. W. 1035; *Segur's Will*, 44 A. 342, 71 Vt. 224.

from this standard; and, as a general rule, any unsoundness of mind which appears not to affect the general faculties, nor to operate on the mind of a testator in regard to his testamentary disposition, is not deemed sufficient to render him incapable of disposing of his property by will.<sup>1</sup> On the other hand, partial insanity or monomania is frequently held in this country to invalidate a will which is the direct offspring thereof, though the testator's general capacity be unimpeached.<sup>2</sup>

160. **The will of one affected by monomania has been sustained** in numerous American instances, notwithstanding some insane delusion or delusions collateral to the disposition.<sup>3</sup>

161. **But the will of a monomaniac has been refused probate**, in numerous American cases; the insane delusion so tainting the testamentary disposition that it could not justly be permitted to operate.<sup>4</sup>

<sup>1</sup> *Pidcock v. Potter*, 68 Penn. St. 342, 8 Am. Rep. 181, 47 A. 940; 198 Penn. St. 326, 82 Am. St. Rep. 808; *Randall, Re*, 59 A. 552, 99 Me. 346.

<sup>2</sup> See the patient and exhaustive analysis of this subject, with citations from reports, English and American, by Surrogate Redfield, in *Merrill v. Rolston*, 5 Redf. 220. And see *Swygart v. Willard*, 76 N. E. 755, 166 Ind. 25; *Orchadson v. Cofield*, 171 Ill. 14, 63 Am. St. Rep. 211, 40 L. R. A. 256, 49 N. E. 197; 109 Mich. 98, 63 Am. St. Rep. 566, 66 N. W. 681.

<sup>3</sup> As in the case of a testator, who entertained the most extraordinary, senseless, and absurd opinions on matters quite disconnected from the disposition of his property. *Thompson v. Thompson*, 21 Barb. 107, sustaining 2 Bradf. 449. And see 162 *post*. Or of one who perversely insisted that his former wife, from whom he was divorced, had been unchaste; and that their child was illegitimate, there being no proof that the delusion affected his parental conduct in the slightest degree, or that his will discriminated unjustly against the child, considering that the latter inherited from the divorced wife besides, who had received a very liberal alimony at the testator's cost. *Cole's Will*, 49 Wis. 179. Or of one whose mental delusion relates merely to his physical condition and the cause of his infirmity. *Hollinger v. Syms*, 37 N. J. Eq. 221; *Ayres v. Ayres*, 43 N. J. Eq. 565 (illusion of a person near death that she will recover). Or even of one deluded, indeed, as to some particular person who might otherwise have expected a legacy under the will, but who cannot possibly derive any legal benefit from having the will set aside. *Stackhouse v. Horton*, 2 McCart. 202. Or generally where it is manifest that one's delusion has not affected his gifts. *Rice v. Rice*, 50 Mich. 448, 15 N. W. 545. And see *Englert v. Englert*, 47 A. 940, 198 Penn. St. 326, 82 Am. St. Rep. 808; 59 A. 552, 99 Me. 396; *Benoist v. Murrin*, 58 Mo. 307; *Denson v. Beazley*, 34 Tex. 191; 31 N. J. Eq. 633; 35 N. Y. 70; 6 Dem. 92; *Schneider v. Manning*, 121 Ill. 376, 12 N. E. 267; 125 Ill. 33, 17 N. E. 66; *Smith v. James*, 72 Iowa, 515, 34 N. W. 309.

<sup>4</sup> As where a father, while attacked with a mental disorder, conceived a strong dislike to his eldest son, without any adequate cause, and, recovering his reason in all respects except this perversion of natural affection, made a will which disinherited the son. *Lucas v. Parsons*, 24 Ga. 640, 71 Am. Dec. 147. The facts in this case strongly resemble those in *Greenwood's Case*, cited *supra*, 157. A perversion of feeling like this is not seldom the last trace left of mental disorder where the convalescent appears in other respects restored to reason. Or where, again, the testator was under a delusion that his nephews, being his heirs-at-law, were conspiring to take his life, and that one of them had caused his death by putting him in a stove. *Seaman's Friend Society v. Hopper*, 33 N. Y. 619; s. c. 43 Barb. 625. Or where he had an unfounded insane delusion that his daughter lived in a house of ill-fame; or that his

162. **Insane delusion should be distinguished from prejudice or error**, as well as from eccentricity. It differs essentially from some rational belief not well founded, however perversely the testator may have clung to it. By delusion in the popular sense of the word, even a sane mind may be possessed; and this fact legal if not medical jurisprudence recognizes when it bases the present incapacity upon what is termed not delusion, but insane delusion.<sup>1</sup>

own child was illegitimate. *Rivard v. Rivard*, 109 Mich. 98, 63 Am. St. Rep. 566-66 N. W. 681; *Petefish v. Becker*, 176 Ill. 448, 52 N. E. 71. Or where the decedent, a woman, became insanely morbid over the marriage made by her heir with her disapproval, and pursued him with the jealousy, vindictiveness, and vulgarity of a monomaniac to the day of her death, giving the bulk of her property to charities by her will. *Merrill v. Rolston*, 5 Redf. 220. And see *American Bible Society v. Price*, 115 Ill. 623, 5 N. E. 126; *Dorman, Re*, 5 Dem. 112. Or where an intemperate husband was shown to be so insanely jealous of his wife, a chaste woman, that he denied the paternity of his own children, beat and abused her on account of her supposed infidelity, and finally shot her dead and committed suicide, leaving a written statement behind which imputed dishonor to her absurdly and falsely. *Burkhart v. Gladish*, 123 Ind. 338, 24 N. E. 118. And so, too, in other cases where the will was made under an insane delusion as to misconduct on the part of the natural recipient of one's bounty. *Thomas v. Carter*, 170 Penn. St. 272, 50 Am. St. Rep. 770, 33 A. 81; *Hardenburgh v. Hardenburgh*, 133 Iowa, 1, 109 N. W. 1014; *Segur's Will*, 44 A. 342, 71 Vt. 224. Insane delusion may relate to the property of which one disposes, rather than to the persons who are the natural objects of his bounty. 13 Phila. 234.

In short, monomania, or partial insanity, will invalidate any testament which may fairly be inferred to be the direct offspring of the malady, and an instrument vitally different from what it would have been had the mind been in its normal sane condition. 14 Phila. 291; *Whitney v. Twombly*, 136 Mass. 145. While the discarding of one's relatives, and distant ones more especially, affords no necessary inference of incapacity, and while mere prejudice against the natural objects of one's bounty should not vitiate a testator's will, the case is different where the testamentary disposition appears to have been colored or distorted by some morbid and false delusion. See *Chaney v. Bryan*, 16 Lea, 63; next section.

Eccentric habits and insane delusion are often suddenly manifested together, so as to operate unfavorably upon a will. See facts in *Miller v. White*, 5 Redf. 320. And an insane perversion may be quite sudden in its manifestation. *Hardenburgh v. Hardenburgh*, *supra*.

<sup>1</sup> Experience teaches us that one who is sensible and reasonable on most subjects, who displays in affairs the greatest sagacity and may be implicitly trusted in the details of business management and the disposition of a large estate, and upon whose mental competency it would be preposterous to cast a doubt, will nevertheless display the most narrow and intolerant views on particular questions or with regard to certain individuals. His antipathies in this respect are really as groundless and wrong as they are violent and yet he will be found to cherish them with as much loyalty as he does his sympathies. We may say that his prejudice or error is the conclusion of a reasoning mind on insufficient evidence. Yet the mind refuses proof or arguments to the contrary in many such instances, and remains wedded to its own convictions, its instinctive likes and dislikes. Strong, violent and unjust prejudices or aversions, if not founded in insane delusion, do not establish mental incapacity; and no will can be set aside on account of any moral obliquity, prejudice or dislike of the testator displayed therein, nor because the particular disposition of property is unnatural or unjust, unless this perversion of the affections can be traced to mental disorder. *Boardman v. Woodman*, 47 N. H. 120; 2 Zab. 117; *Middleditch v. Williams*, 45 N. J. Eq. 726; *Schmidt v. Schmidt*, 66 N. E. 371, 201 Ill. 191 (prejudice against a son estranged from family); *White's Will*, 121 N. Y. 406, 24 N. E. 935 (against a son for



163. **An ill-founded belief not actually insane**, does not destroy testamentary capacity. And where one indulges in an aversion, however harsh, which is the conclusion of a reasoning mind, on evidence no matter how slight or inaccurate, his will cannot on that account be overturned.<sup>1</sup>

164. **Of course, if the will is not tainted** by the prejudice, error or animosity in question, there is all the less reason for contesting it on such a ground.<sup>2</sup>

165. **Yet, after all, the just or unjust character of the will** is here of importance in case of doubtful competency. For be the delusion sane or insane, be the habits of the testator purely eccentric or such as indicate a monomania, the best English and the universal American doctrine treats all this lightly in respect of capacity, provided the delusion or the eccentricity has not operated upon the will, distorting its provisions into something unnatural and unjust. But if, on the contrary, the result is to disinherit, to cut off the natural objects of one's bounty, to produce an absurd, hurtful, irrational will, a court or a jury will set such an instrument aside with little compunction, wherever a doubt remains

joining a Masonic lodge); *Bohler v. Hicks*, 48 S. E. 306, 120 Ga. 800 (resentment against wife for interfering with his dissolute conduct); 6 Dem. 123; *Carpenter v. Bailey*, 94 Cal. 406; *Prentis v. Bates*, 88 Mich. 567.

Some personal grievance operating upon a strong, irritable and obstinate temper produces often the state of mind under which the perverse prejudice is formed; and one who in some way happened to be associated with the grievance, like an officer who serves process for others, or the attorney of the offending client, may suffer from the harsh opinion thus conceived. See e.g. *Turner v. Hand*, 3 Wall. Jr. 120.

<sup>1</sup> Thus, where a sane testator, on slight but insufficient proof clung to the belief that his wife had been unchaste and one of his daughters was illegitimate, and disinherited the latter in consequence, it was decided that the court had no ground for refusing probate of the will. *Clapp v. Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681; *Cole's Will*, 49 Wis. 179, 5 N. W. 346. Cf. *Florey v. Florey*, 24 Ala. 241. See also 146, *supra*: *Stull v. Stull*, 96 N. W. 196, 1 Neb. (unoff.) 380; 103 N. W. 61, 73 Neb. 492; *Bean v. Bean*, 108 N. W. 369, 144 Mich. 599. So, too, it is held that a testator's opinion that some of his children had treated him badly, though erroneously formed, will not invalidate his testament. See *Holton v. Cochran*, 208 Mo. 314; *Short v. Brubaker*, 94 Md. 165, 106 S. W. 1035; *ib.* 333. The existence of dislikes, prejudices and animosities, however unfounded, in one's mind does not of itself destroy testamentary capacity, nor justify a court in avoiding an instrument which is unaffected by the fraud or undue control of other persons. *Carter v. Dixon*, 69 Ga. 82; *Kendrick's Estate*, 62 P. 605, 130 Cal. 360; *Skinner v. Lewis*, 67 P. 951 (Oreg. 1902), where gossip of neighbors supplied the evidence. The dislike arising from domestic feuds may be injuriously demonstrated in a will without imputing insanity of any kind to the testator. *Coit v. Patchen*, 77 N. Y. 533. Nor does proof of eccentricity, caprice, fretfulness, and a suspicious and irritable temper establish either a lack of mental capacity or insane delusions incompatible with the power to dispose at discretion. *Blakely's Will, Re*, 48 Wis. 294, 4 N. W. 337; *Lancaster v. Alden*, 58 A. 638, 26 R. I. 170 (a high-strung, nervous temperament, with "spells" of violence).

<sup>2</sup> See *Lancaster v. Alden*, *supra*. And see *Owen v. Crumbaugh*, 228 Ill. 380, 119 Am. St. Rep. 442, 81 N. E. 1044.

whether the testator was not fixed in his fallacy by others, so as to have been unduly influenced, or else through his own morbid reflection and experience, his peculiar habits and mode of life, perverted in mind until the delusion became an insane one, a monomania, and in this particular respect at least he was unsound, deranged.<sup>1</sup>

166. These leading principles apply to religious opinions of a testator, and wherever some alleged delusion upon matters supernatural furnishes the ground of controversy. Unquestionably the speculative belief any individual may entertain concerning the present or the future state, things natural or supernatural, religion, politics, education, or any other of those agitating problems upon which men think and divide in sentiment, should properly be considered an affair of his own conscience; and it is within very narrow limits that any such belief can be confidently pronounced a delusion.

<sup>1</sup> This is not, perhaps, what the courts regularly assert; but an examination of the decided cases under our present head will show that it is usually the practical consequence. No class of testaments, indeed, where testamentary capacity can be called in question, will be found more easily indulged than those where nothing worse than some harmless delusion can be set up against the testator; but none are more likely to be set aside, when perverted in terms from justice and natural affection, or as the Roman law styled them, inofficious, than those where the delusion, if such it may be called, must have directly induced a baneful disposition. True, a sane mind must be permitted to work out its own harsh, cruel and revengeful purposes for *post mortem* effect; and yet, in determining whether there was entire sanity or monomania, whether the mind, even if sane, had not been brought by some other influence, unfairly exerted, to operate as it did, regard may be had to the contents of the particular will and the circumstances surrounding its execution. See *e.g.* remarks of court in *Banks v. Goodfellow*, L. R. 5 Q. B. 549, and in *Boughton v. Knight*, L. R. 3 P. & D. 64; *Rivard v. Rivard*, 109 Mich. 98, 63 Am. St. Rep. 566, 66 N. W. 681.

<sup>2</sup> So long as one's course of conduct in pursuance of his opinions does not transcend the laws which public policy sees fit to prescribe for society, there is no reason why he should not by testament, as well as by a gift while living, promote with his own fortune the views to which he has attached himself. Upon such considerations wills are justly made which, without neglecting the claims of natural affection, endow churches, seminaries, and societies for the propagation of truth in accordance with the testator's own creed.

But to all this there is a legal limit. Certain so-called truths must necessarily be obnoxious to public policy; errors, in fact, and pernicious to society in its existing stage, according to the standard by which its safety and welfare must be judged. Opinions are held by individuals conscientiously and firmly—as, for instance, in favor of free love, absolute community in property, subversion of civil authority, pure atheism—which courts, though disposed to leave speculation free, may well refrain from sanctioning, when it comes to an individual bequest to propagate. Moreover, upon some such subjects, religion and the supernatural world in particular, men may safely be called deluded; and more than this, insanely deluded, monomaniacs, or even general maniacs. Especially must insanity be the symptom, where the enthusiast or fanatic, as often may happen, comes to imagining himself vested with the divine or supernatural functions. See *e.g.* *Smith v. Tebbitt*, L. R. 1 P. & D. 398. Such extreme derangement, if not general, amounts at least to monomania; we say of such a person that he is crazy on religious subjects, though he may show himself otherwise capable and reasonable in affairs.

167. If, then, the insane delusion exists without other appearance of incapacity, but, on the contrary, testamentary capacity is apparent in all other respects, the essential question is whether the insane delusion, the monomania, has affected the will and the particular disposition. For the will which delusion does not invalidate is, after all, a rational one.<sup>1</sup>

168. The will of one who believes in witchcraft, magic, ghosts, and spectral influences, whether supernatural or only mysterious, is not on that sole account void.<sup>2</sup> Nor does the belief in spiritualism invalidate a will as a matter of law;<sup>3</sup> nor the belief in clairvoyance, mesmerism, faith-cures, "Christian science,"<sup>4</sup> or other matters upon which the majority of society are skeptical.<sup>5</sup> To make evidence of such beliefs admissible to show mental incapacity it must first appear that the will was the offspring of such belief.<sup>6</sup>

<sup>1</sup> *Supra*, 150, 151, 157.

<sup>2</sup> *Addington v. Wilson*, 5 Ind. 137, 61 Am. Dec. 81; *Kelly v. Miller*, 39 Miss. 19; *Thompson v. Thompson*, 21 Barb. 107; 2 Bradf. 449; 6 Dem. 92.

<sup>3</sup> *Brown v. Ward*, 53 Md. 376, 36 Am. Rep. 422; *Otto v. Doty*, 61 Iowa, 23, 15 N. W. 581; *Smith's Will*, 52 Wis. 543, 8 N. W. 616, 38 Am. Rep. 756; *Middleditch v. Williams*, 45 N. J. Eq. 726, 17 A. 826. But cf. *Lyon v. Home*, L. R. 6 Eq. 655.

<sup>4</sup> *Brush's Will*, 72 N. Y. S. 421. And see *Scott v. Scott*, 72 N. E. 708, 212 Ill. 599 (Swedenborgianism).

<sup>5</sup> *La Bau v. Vanderbilt*, 3 Redf. 384.

<sup>6</sup> Even were one thought insane instead of credulous on such subjects, he might still be unimpaired in general testamentary capacity. But where such a belief affects directly the provisions of the will, perverts them from their just and natural course, and gives an irrational tincture, so to speak, to the whole instrument, a serious issue is presented at the probate. It is a peculiarity of spiritualism, that the believer considers himself guided in his conduct by invisible agencies; for which reason one recent case, at least, under this head seems to regard undue influence rather than insane delusion and incapacity as the ground upon which such wills should be assailed. *Robinson v. Adams*, 62 Me. 369, 16 Am. Rep. 473. But this refines too greatly the scope of controversy in such cases; for we should still treat these spiritual whisperings, like dreams or visions, as the testator's own delusion, and consider him a capable or incapable testator, especially when the offspring of such invisible converse partakes more nearly of the diabolical than divine nature. If, however, he made his will at the dictation of a clairvoyant or other adviser palpable in the flesh, that of course is another matter. Cf. *Thompson v. Hawks*, 14 Fed. 902; *Greenwood v. Cline*, 7 Or. 17; *Smith's Will*, 52 Wis. 543, 38 Am. Rep. 756, 8 N. W. 616, 9 N. W. 665; *O'Dell v. Goff*, 149 Mich. 152, 119 Am. St. Rep. 662, 10 L. R. A. (N. S.) 989, 112 N. W. 736 (drawing the distinction as to such undue influence). As to beings invisible and intangible, however, one's speculative belief in their existence need not affect his testamentary capacity at all; but if one is possessed by spirits or the devil, when his will is made, it is enough that the will is found the product of a deluded or deranged mind, to justify setting it aside when inofficious, without attempting to resolve what views of disposition the spirits or the devil pressed upon the testator or how hard they pressed them. As to influence or delusion caused by the supposed dictation of spirits, see *Buchanan v. Pierie*, 54 A. 583, 205 Penn. 123, 97 Am. St. Rep. 725; *Randall, Jr.*, 59 A. 552, 99 Me. 396; *Orchardson v. Cofield*, 171 Ill. 14, 63 Am. St. Rep. 211, 49 N. E. 197; 161 Ill. 114, 43 N. E. 789; 44 Neb. 175, 62 N. W. 501; *Spencer's Estate*, 96 Cal. 448, 31 P. 453.

## CHAPTER IX.

## PROOF OF CAPACITY AND INCAPACITY.

169. **Wherever a will is presented for probate and no contestant appears,** most of the facts essential for establishing the instrument are readily taken for granted. In England there is a simple mode of procedure for non-contested cases, known as the probate in common form; and though scarcely an American State appears to have adopted that precise mode, yet we not uncommonly find the proof of the will reduced to a minimum under such circumstances.<sup>1</sup>

170. **But whenever a contest arises over the will,**—a situation of affairs unlikely to occur before the bereaved family, heirs, kindred, and interested parties have had private warning that some of their own number are too profoundly dissatisfied not to break through this atmosphere of decorum, and expose to scandal the home relations of the decedent,—it becomes a preliminary inquiry upon which of the litigating parties rests the burden of proof. There appears a variance of opinion expressed on this point. The true rule we conceive to be this: that wherever the capacity or incapacity of the testator is called in question, whether because of infancy or insanity, or on any other of the grounds we have already considered, and so, too, if the testator's death, residence, or any other essential jurisdictional fact is disputed, the ultimate burden of proof is upon the executor, or those who set up the particular will in controversy. And this rule holds good in whatever form the trial should properly be conducted, whether in original forum of probate, or, upon appeal, so long as the issue is directly taken upon the original probate of that identical will. In general, the proponent of a will has the burden of proving its execution and that it was duly executed by a party mentally competent.<sup>2</sup>

<sup>1</sup> See Executors, *post*, Part I, c. 2.

Capacity in the testator is inferred readily from his due execution of the instrument; and as for the fact of his death, of his last place of residence, the question who are his kindred, or his heirs-at-law, the identity of the executor named, and the like, all these matters are *prima facie* inferred by the court from recitals of the petition for probate, with little or no formal examination. A certain sobriety and decorum is preserved in these local judicial proceedings, as at the funeral; as though some painful but necessary solemnity over the deceased must be carried out without probing officiously the feelings and disposition of the surviving family, but rather anticipating their presumed wishes.

<sup>2</sup> 1 Greenl. Evid. § 77; 1 Redf. Wills, 31; Hall v. Perry, 87 Me. 569, 47 Am. St. Rep. 352, 33 A. 160; Prentiss v. Bates, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494; cases *infra*. See Baron Parke in Barry v. Butlin 1 Curt. 637, distinguishing from deeds.

171. There are numerous cases, however, in which the rule as to burden of proof appears to have been laid down by eminent judges to the contrary.<sup>1</sup> It is only in this delicate investigation of mental condition, and, moreover, of free volition in the testator<sup>2</sup> that judicial variance may be expected.<sup>3</sup>

172. Confusion here arises because two principles are laid down which seem to conflict. The first, already stated, is that upon the proponent rests the general burden of establishing capacity, or, in other words, sanity. The second is, that a presumption arises that every adult is *compos mentis*, and consequently that the party who alleges insanity has the burden of proving that unnatural condition.<sup>4</sup>

173. In England it is laid down that if a party impeaches a will on account of insanity in the testator, he must establish such insanity by clear and satisfactory proof; for the instrument purporting on its face a legal act, sanity must be presumed until the contrary is shown.<sup>5</sup> At the same time it should be borne in mind that the presumption of sanity is not to be treated as a legal presumption, but at the utmost as a mixed presumption of law and fact if not as a mere presumption of fact; that is, an inference from the absence of evidence to show that the testator had not that mental soundness which experience shows to be the general condition of the adult human mind.<sup>6</sup> On the whole, the English

<sup>1</sup> The confusion in the legal mind on this subject comes perhaps from expatiating beyond the facts which the particular case presented for decision. Surely one who offers the will for probate cannot be expected to go far with testimony to prove a negative, and hence the burden of proof may shift imperceptibly.

<sup>2</sup> See next c.

<sup>3</sup> Rarely do such other essential facts as death, last place of residence, or full age, elicit discussion of this kind at all; and if ever they did, the point at issue being so comparatively simple, we should see more clearly that it is the proponent, not the contestant of the will, who moves in advance, and carries the general burden of proving whatever may be requisite to establishing the particular instrument in a court of probate as legally the last will and testament of the deceased.

<sup>4</sup> In this apparent contradiction originates our present confusion; and from the abundant *dicta* to be found in the reports, one might argue, as an abstract proposition, that the burden was on the one party or the other, as best suited his purpose.

<sup>5</sup> 1 Wms. Exrs. 20, citing *Groom v. Thomas*, 2 Hagg. 434, and 1 Hagg. 109.

<sup>6</sup> If, therefore, a will is produced before a jury, and its execution proved, the will appearing rational on its face, and no other evidence offered, the jury would be properly instructed to find for the will. And if the party opposing the will gives some evidence of incompetency, the jury may, nevertheless, find in favor of the will if it does not disturb their belief in the testator's competency. And in such case the presumption of competency would prevail. Still the *onus probandi* lies in every case on the party alleging a will, and he must satisfy the jury that it is the will of a capable testator; and when the whole matter is before them on evidence given on both sides, if the evidence does not satisfy them that the will is the will of a competent testator, they ought not to affirm by their verdict that it is so. The same considerations should

rule appears to be, that if a will rational on the face of it is shown to have been duly executed, it is presumed, in the absence of any evidence to the contrary, that it was made by a person of competent understanding. But if there are circumstances not merely opposed to but sufficient to counterbalance that presumption, the decree must be against the validity of the will, unless the evidence, taken altogether, is sufficient to establish affirmatively that the testator was of sound mind when he executed it.<sup>1</sup>

174. **These English authorities embody the best elementary rules**, apparently, for so solving a conflict of principles, which, after all, is more apparent than real; holding the proponent to his general proof, while giving to the presumption of sanity all that can fairly be claimed for it. From this point of view, the presumption in favor of sanity where testamentary causes are tried is not a legal one, but one of fact; and the *prima facie* case in favor of the proponent, when the will is assailed as the offspring of insanity, not only does not relieve him from establishing capacity as the ultimate conclusion upon the whole evidence, but is itself the result of facts he has established at the outset, a first stage reached in propounding the will. In various American States, however, the presumption in favor of sanity has been styled a legal presumption, and appears to have been so treated in testamentary causes.<sup>2</sup> This difference, though much dilated upon, is more verbal than substantial, as commonly applied. All, or most, of our decisions agree in substance, that whether as a legal presumption or as a presumption of fact or mixed presumption, amounting only to a *prima facie* case, there exists, upon proof that the will, a natural one on its face, was duly executed by an adult not otherwise incapacitated, a presumption in favor of the testator's sanity which they who

apply where it is a judge instead of a jury who decides upon the evidence. 1 Wms. Exrs. 21; Sutton v. Sadler, 3 C. B. N. S. 87; Symes v. Green, 1 Sw. & Tr. 401; 6 Ir. Eq. 611.

<sup>1</sup> Such a statement seems to import, and correctly, too, that the burden being on the proponent of the will throughout, he has made out his *prima facie* case of testamentary capacity when he shows a rational instrument properly signed and witnessed. But, on the other hand, the evidence establishing due execution should leave a favorable impression of competency; and testamentary incapacity may be established by the mere cross-examination of the proponent's witnesses, without any direct evidence on the part of the contestant. Cases *supra*; Barry v. Butlin, 1 Curt. 637, *per* Baron Parke.

<sup>2</sup> See Baxter v. Abbott, 7 Gray 71, 83; Harper v. Harper, 1 N. Y. Supr. 351; Aikin v. Weckerly, 19 Mich. 482. A local statute of wills sometimes affects the case. 69 P. 294, 136 Cal. 558; Knox's Appeal, 26 Conn. 20; Baker v. Baker, 67 N. E. 410, 202 Ill. 595.

impeach the will are bound at this stage to overcome.<sup>1</sup> And the larger and better class of American authorities point, moreover, to the conclusion that the court or jury trying the case must, upon the whole evidence, be satisfied that the testator was of sound mind; so that if there be inevitable doubt left on this point from all of the testimony, the will cannot be considered as proved.<sup>2</sup> This conforms practically to the English rule just stated.

175. **Whether the subscribing witnesses must first testify as to insanity** is another difficult inquiry in this connection. One would suppose that the simple fact that two or three witnesses (according as the local statute may have prescribed) append their signatures in the execution of the will, strengthens materially any presumption which may arise in favor of the testator's sanity, or the *prima facie* case on behalf of the will.<sup>3</sup> But the cases on this

<sup>1</sup> *Cotton v. Ulmer*, 45 Ala. 378, 6 Am. Rep. 703; 65 Penn. St. 368; *Perkins v. Perkins*, 39 N. H. 163; *Kempsey v. McGinnis*, 21 Mich. 123; *Herbert v. Berrier*, 81 Ind. 1; *Day v. Day*, 2 Green Ch. 549; *Fee v. Taylor*, 83 Ky. 259; 130 Ill. 69, 22 N. E. 853; *Wilbur v. Wilbur*, 129 Ill. 392, 21 N. E. 1076; *McCulloch v. Campbell*, 49 Ark. 367, 5 S. W. 590; *Allen v. Griffin*, 69 Wis. 529, 35 N. W. 21; *Wagner v. Ziegler*, 44 Ohio St. 59, 4 N. E. 705; 179 Penn. 386, 36 A. 1130; *Barber's Appeal*, 63 Conn. 393, 22 L. R. A. 90, 27 A. 973; *Hull's Will*, 89 N. W. 979, 117 Iowa, 738; *Merriman v. Merriman*, 55 N. E. 734, 153 Ind. 631; *Woodford v. Buckner*, 63 S. W. 617, 23 Ky. Law. 627; *Jones v. Collins*, 51 A. 398, 94 Md. 403; *Southworth v. Southworth*, 73 S. W. 129, 173 Mo. 59.

<sup>2</sup> *Gray*, 524; *Delafield v. Parish*, 25 N. Y. 9; *Robinson v. Adams*, 62 Me. 369, 16 Am. Rep. 473; *McGinnis v. Kempsey*, 27 Mich. 363; *Turner v. Cook*, 36 Ind. 129; *Tingley v. Cowgill*, 48 Mo. 291; *Williams v. Robinson*, 42 Vt. 658, 1 Am. Rep. 359; *Aikin v. Weckerly*, 19 Mich. 482; *Knox's Appeal*, 26 Conn. 20; *Renn v. Lamon*, 33 Tex. 760; *Thompson v. Kyner*, 65 Penn. St. 368; *Boardman v. Woodman*, 47 N. H. 120; *Wetter v. Habersham*, 60 Ga. 193; 26 Penn. St. 404; *Day v. Day*, 2 Green Ch. 549; 2 Rich. 229; 70 N. E. 675, 209 Ill. 193; *Fulton v. Umberhend*, 67 N. E. 829, 182 Mass. 487; *Rathjens v. Merrill*, 80 P. 754, 38 Wash. 482; *Baker v. Baker*, 67 N. E. 410, 202 Ill. 595; *Slaughter v. Heath*, 127 Ga. 747, 57 S. E. 69; 227 Ill. 183; 102 Me. 72, 118 Am. St. Rep. 266.

Some of the above opinions distinguish wills from deeds in this respect of presuming sanity; but other opinions repudiate such a distinction and rule with emphasis that the burden of proof lies upon the person who asserts unsoundness of mind. See *Sloane v. Maxwell*, 2 Green Ch. 580; *Tyson v. Tyson*, 37 Mo. 567; *Grubbs v. McDonald*, 91 Penn. St. 236; 28 Md. 115, 92 Am. Dec. 666; *Gray v. Rumrill*, 44 S. E. 697, 101 Va. 507.

The safer opinion steers between the two extremes; and nothing better reconciles the discrepancy of opinions as thus expressed (for, after all, some discrepancy must be admitted) than to compare the cases by their respective decisions upon the facts actually presented. If we do this, we shall find the conflict reduced to a very narrow range. Where no evidence of incapacity is produced, very slight evidence of capacity should, at all events, be enough. If a local statute puts the burden upon the contestant that statute must regulate. 86 P. 695; 149 Cal. 227.

<sup>3</sup> For why should two or three have signed thus, unless intending some sort of a voucher that the testator appeared to know what he was about? Though, to be sure, if any such witness were closely questioned in court, his testimony might prove the reverse of favorable on this point. Unfortunately, in this country wills are witnessed out of good nature by persons who seem quite heedless of the responsibility they incur

point are not quite harmonious; and we may still infer that wherever execution is proved of a will natural and regular upon its face, and there is an absence of further evidence upon the point of sanity, the proponent ought to be entitled to probate.<sup>1</sup>

176. **According to the better opinion**, the general burden is upon the proponent to establish sanity by a preponderance of evidence, wherever the examination of subscribing witnesses leaves a genuine doubt.<sup>2</sup> On an issue as to testamentary capacity, where the evidence is conflicting, after a fair trial before a jury (as our probate appeals from the county judge as trier are commonly conducted), to whom the proof is submitted under proper instruction, the finding of the jury concludes the point.

177. **Subscribing witnesses are the primary and chief resource** for establishing the instrument to the satisfaction of court or jury wherever a will is offered for probate. These witnesses, varying in number under our local enactments, from two to three or more, should be produced, if possible, in case of a contest; but in uncontested wills, a less number, perhaps one, may usually suffice; while in

in so doing; and it is distinctly ruled that by the mere fact of attestation no presumption is afforded of any opinion which the witness may have had, favorable or unfavorable, concerning the sanity of the testator.

<sup>1</sup> *Perkins v. Perkins*, 39 N. H. 169, and cases cited; *Baxter v. Abbott*, 7 Gray, 71; *Delafield v. Parish*, 25 N. Y. 9; *Wilbur v. Wilbur*, 129 Ill. 392, 21 N. E. 1076; 47 N. H. 120; *Thompson v. Kyner*, 65 Penn. St. 368; *Waters v. Waters*, 78 N. E. 1, 222 Ill. 26, 113 Am. St. Rep. 359. Cf. *Tatham v. Wright*, 2 Russ. & My. 1, which looks with disfavor upon a subscribing witness who purposes to testify against the will.

In some states contrary to the general opinion, it is held that the party propounding a will must not only prove execution, but must also offer positive proof of his testator's capacity. Thus, in Massachusetts practice, the subscribing witnesses are called upon to testify not only concerning the fact of execution, but as to the testator's mental condition besides. 7 Pick. 94; *Crowninshield v. Crowninshield*, 2 Gray, 524. But even here, were all the witnesses to the will dead, incapable, or in unknown parts, so that none could be produced, the execution of the will could be proved by evidence of their handwriting; and upon this proof, without other evidence showing sanity or insanity, the proponent would be entitled to probate. *Baxter v. Abbott*, 7 Gray, 71. In many, perhaps most, of our courts, no evidence of the testator's competency, nothing beyond the mere formal proof of execution in aid of the natural presumption of sanity is requisite in order to make out a *prima facie* case in favor of the will. *Perkins v. Perkins*, 39 N. H. 168; *Beaubien v. Cicotte*, 8 Mich. 9; *Taff v. Hosmer*, 14 Mich. 309; *Thompson v. Kyner*, 65 Penn. St. 568. Cf. *Gerrish v. Nason*, 22 Me. 438, 39 Am. Dec. 589; *Waters v. Waters*, 78 N. E. 1, 222 Ill. 26, 113 Am. St. Rep. 359. For the English rule see 3 C. B. N. S. 87. Statutes sometimes define. 40 Minn. 371. And on the whole, American authority preponderates to the view that when the witnesses produced for probate are not only questioned upon the fact of execution, but asked besides whether they regarded the testator as of sound and disposing mind and memory, this last is form merely, or at least precautionary, and not indispensable to establishing the presumption of capacity upon which probate should be granted.

<sup>2</sup> See *Ailkin v. Weckerly*, 19 Mich. 482, and cases cited; *Sutton v. Sadler*, 3 C. B. N. S. 87; *Symes v. Green*, 1 Sw. & Tr. 401; *Bever v. Spangler*, 93 Iowa, 576, 61 N. W. 1072; *Reichenbach v. Ruddach*, 127 Penn. St. 564, 18 A. 432. The *dicta* are sometimes different, but facts in a case usually support the above proposition.



some States, even when opposed, the proponent calls only such witnesses as may give him a good *prima facie* case, and there rests.<sup>1</sup> If a witness be dead, incapable, or in parts unknown, his handwriting is proved, and such issues as the present must necessarily be determined without him.<sup>2</sup> Even where a will is contested, it may be regularly established by the evidence of one subscribing witness and testimony that the other or others actually signed as such, if the absence of the latter be duly accounted for and there is good corroborating evidence of capacity.<sup>3</sup>

178. **The testimony of subscribing witnesses is important but not conclusive as to sanity or due execution, and even a proponent may discredit them.**<sup>4</sup>

179. **The general rule in English courts, when such issues are tried, is, that the proponent of the will must produce all the subscribing witnesses available and make them his witnesses, giving to the contestant an opportunity to cross-examine them.**<sup>5</sup> But under peculiar circumstances the court will dispense with this necessity.<sup>6</sup>

180. **The declarations of a deceased subscribing witness, or of one beyond the jurisdiction, tending to show that he thought the testator sane or insane, are incompetent testimony on the issue of sanity or insanity.**<sup>7</sup>

<sup>1</sup> Thornton v. Thornton, 39 Vt. 122. See as to attestation, etc., *post*, 348.

<sup>2</sup> As to the production, if possible, of all the subscribing witnesses by the party propounding the will, where an issue is made, the American rule is not uniform. Thornton v. Thornton, 39 Vt. 122; Alexander v. Beadle, 7 Coldw. 126; 60 Vt. 524 (not within reach of State process); Whitman v. Morey, 63 N. H. 448; Field's Appeal, 36 Conn. 277. And see 347-349. Any available subscribing witness omitted by the proponent the contestant can call to the stand; and a subscribing witness after being examined by the one party may be cross-examined by the other. He may be thus discredited. 64 Md. 138, 21 A. 273; 6 Ir. Eq. 611.

<sup>3</sup> Jones v. Roberts, 96 Wis. 427, 70 N. W. 685, 71 N. W. 883. Cf. 168 Ill. 459, 48 N. E. 113.

<sup>4</sup> The value of the subscribing witness's testimony as to capacity or undue influence should be weighed like that of any other witness. And the fact that any or all of the subscribing witnesses testify against the testator's mental capacity, does not conclude the proponent, if other witnesses testify favorably; for the will may be established upon sufficient proof in opposition to the testimony of the subscribing witnesses. Thornton v. Thornton, 39 Vt. 122; Martin v. Perkins, 56 Miss. 204; Frear v. Williams, 7 Baxt. 550, 556; Alexander v. Beadle, 7 Coldw. 126; Garrison v. Garrison, 15 N. J. Eq. 266; *ib.* 243. So may the unfavorable testimony of a sole surviving witness be overcome on the issue of undue influence. Coleman's Estate, 185 Penn. St. 437, 40 A. 69; Crandall's Appeal, 63 Conn. 365, 38 Am. St. Rep. 375, 28 A. 531.

<sup>5</sup> Tatham v. Wright, 2 Russ. & My. 1; Barry v. Butlin, 1 Curt. 637; 6 Ir. Eq. 611.

<sup>6</sup> Especially if all the witnesses have been produced in court by the proponent, so that the other party might have called the omitted witness. Lowe v. Joliffe, 1 W. Bl. 365; Tatham v. Wright, *supra*. As to earlier English practice, see Story Eq. Jur. § 1447; 1 Redf. Wills, 34.

<sup>7</sup> 7 Gray, 71; Sewall v. Robbins, 139 Mass. 164; Boardman v. Woodman, 47 N. H. 120; Thompson v. Kyner, 65 Penn. St. 368. See Williams v. Robinson, 42 Vt. 664, 1 Am. Rep. 359. Cross-examination cannot be applied to such testimony.

181. **Medical men and others asked to witness** a person's will may testify capacity for themselves and should not sign unless satisfied.<sup>1</sup>

182. **By placing his name to the instrument, the witness, in effect,** certifies to his knowledge of the mental capacity of the testator, and that the will was executed by him freely and understandingly, with a full knowledge of its contents. Such is the legal effect of the signature of the witness, when he is dead, or is out of the jurisdiction of the court.<sup>2</sup>

183. **The attestation clause in a will might well be drawn so as to certify expressly** the belief of the subscribing witnesses that the testator at the time of execution was of sound mind and memory.<sup>3</sup>

184. **The rule is that the proponent goes forward in the proof** and has the opening and close of the case; and such is the general practice where sanity is at issue.<sup>4</sup>

184a. **In general, the proponents of an adult's will make a *prima facie* case,** where the formal execution of the will according to statute is proved, and the subscribing witnesses testify favorably upon the question of sanity.<sup>5</sup>

<sup>1</sup> See advice given in Ray Med. Jur. 658; 1 Redf. Wills, 95. It must be confessed, that in this country, at least, testators are not disposed to submit to catechising from those whom they may have called in to witness their wills, nor even to state to them confidentially the details of a testamentary disposition. A dubious bystander may, however, on his part, well refuse to take the responsibility of a subscribing witness. One should only subscribe as witness when he can conscientiously testify without reserve in favor of the will and its proper execution; and it is for the true interest of every rational testator to procure witnesses who will stand resolutely by the transaction against all insidious or open opposition to the probate.

<sup>2</sup> See Chancellor Walworth in *Scribner v. Crane*, 2 Paige, 147. See also *Garrison v. Garrison*, 15 N. J. Eq. 266; *Tatham v. Wright*, 2 Russ. & My. 1.

<sup>3</sup> To contradict under oath at the trial such a writing must greatly discredit a subscribing witness unless he can account for the discrepancy; as, for instance, by showing that he signed doubtfully and with little opportunity to judge, and that the contents and character of the will, when exposed to view, convinced him to the contrary; and even thus, his honest opinion should carry very little weight in the case. See *Garrison v. Garrison*, 15 N. J. Eq. 266; pt. III, c. 3, *post*.

<sup>4</sup> *Boardman v. Woodman*, 47 N. H. 120; *Robinson v. Adams*, 62 Me. 369; *Brooks v. Barrett*, 7 Pick. 96; *Comstock v. Hadlyme*, 8 Conn. 261, 20 Am. Dec. 100; *Taff v. Homer*, 14 Mich. 309; *Kempsey v. McGinniss*, 21 Mich. 123; *Williams v. Robinson*, 42 Vt. 658, 1 Am. Rep. 359; *Syme v. Boughton*, 85 N. C. 367; *Theological Seminary v. Calhoun*, 25 N. Y. 422; 1 Bradf. 69, 94; 170, 174 *supra*. But in Maryland the practice conforms to the extreme view taken upon the presumption of sanity; and caveators who assert unsoundness of mind are regarded as plaintiffs with the burden of proof upon them, and they have the right to open and close. 37 Md. 567; *Jones v. Collins*, 51 A. 398, 94 Md. 403; *Leach v. Burr*, 23 S. Ct. 393; 105 Md. 81, 65 A. 918. The same rule obtains in Delaware. *Chandler v. Ferris*, 1 Harring. 460. And in some States it is held that on appeal from the probate court in such trials the appellant becomes the actor and has the opening and close both in evidence and argument.

<sup>5</sup> *Rice* (S. C.), 35, 271. See *Runyon v. Price*, 15 Ohio St. 1, 86 Am. Dec. 459 (appeal under the local statute).

<sup>6</sup> *Fulbright v. Perry County*, 145 Mo. 432, 46 S. W. 955; *Slingloff v. Bruner*, 174 Ill. 561, 51 N. E. 772; 173, 174.

185. But wherever the issue is presented, whether a certain instrument propounded is the last will of the deceased, all questions affecting the validity of the instrument may be presented;<sup>1</sup> and testamentary capacity or incapacity becomes in the main a decision of fact upon all the evidence presented, and the preponderance of the testimony, every circumstance being weighed in proof.<sup>2</sup>

186. Testamentary capacity or incapacity at the precise date of the transaction, is, moreover, the real point at issue. Hence the condition of the testator's mind shortly before or after executing the instrument is only of importance so far as it establishes his mental condition when the execution actually occurred.<sup>3</sup>

187. When the habit of general insanity is once shown to have existed not very long before the execution of the will in question, it will be so far presumed to have continued to the date of execution that the proponent must overcome this unfavorable presumption before the will he offers can be established.<sup>4</sup> So, too, does

<sup>1</sup> Davis v. Rogers, 1 Houst. 44.

<sup>2</sup> Gardiner v. Gardiner, 34 N. Y. 155; Barber's Appeal, 63 Conn. 393, 27 A. 973; Hess v. Killebrew, 70 N. E. 675, 209 Ill. 193. Where the will appears absurd or irrational on its face, and not merely harsh, an unfavorable presumption arises. Bradford v. Blossom, 105 S. W. 289, 207 Mo. 177; Blackman v. Andrews, 150 Mich. 322, 114 N. W. 218. Of course, proof "beyond a reasonable doubt" does not apply here. 34 So. 325, 82 Miss. 1.

Ill health, distress, great pain, etc., prove no incapacity. *Supra*, 84. And see Stevens v. Leonard, 56 N. E. 27, 154 Ind. 67, 77 Am. St. Rep. 446; Ring v. Lawless, 60 N. E. 881, 190 Ill. 520; 60 N. E. 303, 156 Ind. 535; Latour's Estate, 73 P. 1070, 140 Cal. 414; Berry v. Trust Co., 53 A. 720, 96 Md. 45 (excessive smoking, etc.); Havens v. Mason, 62 A. 615, 78 Conn. 410, 3 L. R. A. (N. S.) 172; Reed's Estate, 90 N. W. 319, 86 Minn. 163 (melancholy).

<sup>3</sup> The fact of a testator's subsequent suicide, of his sudden death from apoplexy, or even of an attack of apoplexy shortly before he made his will, bears simply upon that point, as already shown. *Supra*, 119, 120. See Lewis's Will, 51 Wis. 101, 7 N. W. 829 (will of one who had an epileptic fit shortly before and shortly after executing it); Brown v. Riffin, 94 Ill. 560; 77 N. Y. S. 663. As to suicide, see Burrows v. Burrows, 1 Hagg. 109; Elwee v. Ferguson, 43 Mo. 479; Duffield v. Robeson, 2 Harring. 375; Godden v. Burke, 35 La. Ann. 160; Brooks v. Barrett, 7 Pick. 94. Mental condition on the day before or the day after making a will is admissible to show mental condition on the day of making the will. Dyer v. Dyer, 87 Ind. 13. Cf. Sibley v. Morse, 109 N. W. 858, 146 Mich. 413; Hamburger v. Rinkel, 64 S. W. 104, 164 Mo. 398 (capacity three months after executing); Todd v. Todd, 77 N. E. 680, 221 Ill. 410; Nichols, *Re*, 62 A. 610, 78 Conn. 429; Wharton's Will, 109 N. W. 492, 132 Iowa, 714; Spencer v. Terry, 94 N. W. 372, 133 Mich. 39; Ward v. Brown, 44 S. E. 488, 53 W. Va. 227; McCoy v. Jordan, 69 N. E. 358, 184 Mass. 575; Threkeld v. Bond, 92 S. W. 606, 29 Ky. Law, 177. All irrelevant testimony should be excluded. The discretion of the judge at the trial should largely control as to relevancy of testimony. McCoy v. Jordan, *supra*; 127 Penn. St. 564, 18 A. 432. From such instances one may gather how strong, on the whole, should be the proof of a testator's insanity in order to invalidate the instrument offered as his last will and testament.

<sup>4</sup> Smith v. Smith, 4 Baxt. 293; 3 Wash. C. C. 586; 7 Gill, 10; Halley v. Webster, 21 Me. 461, by Whitman, C. J.; Hoopes's Estate, 174 Penn. St. 373, 34 A. 603; Bradford v. Blossom, 207 Mo. 177, 105 S. W. 289; Morere's Succession, 38 So. 435, 111 La. 506; Gesell v. Baugher, 60 A. 481, 100 Md. 677.

proof that the testator was under guardianship for insanity quite discredit his will.<sup>1</sup> But all unfavorable presumptions of this kind, whether stronger or weaker, may be removed by appropriate testimony;<sup>2</sup> and it is sufficient for the proponent to show that such insanity had ceased to exist when the will was executed, or that it never existed at all, or that the will was made during some lucid interval or respite from the malady.<sup>3</sup>

188. **The character of the will itself, whether natural or unnatural,** reasonable, or absurd, just or unjust, bears strongly, as we have seen, upon the issue of general insanity, and the more so when its provisions show a radical and unaccountable change from the testator's normal purpose. Yet we have also seen that one may capriciously change his purpose, and that a will which disposes harshly, foolishly or unequally is not to be set aside for that cause if the testator were really sane when he made it.<sup>4</sup> We have seen that, in connection with the contents and character of the will itself, the manner in which it was written and executed, may aid in establishing sanity or insanity.<sup>5</sup>

<sup>1</sup> Little v. Little, 13 Gray 264; Rider v. Miller, 86 N. Y. 507; Stevens v. Stevens, 127 Ind. 560, 26 N. E. 1078; *supra*, 81, 82.

<sup>2</sup> Rice v. Rice, 50 Mich. 448, 15 N. W. 545.

<sup>3</sup> 1 Phillim. 100; 8 Watts, 66; 5 Johns, 144, 4 Am. Dec. 330; 2 Green Ch. 629; *supra*, 72, 88, 107. As to fever, delirium, etc., see Lord Eldon in 11 Ves. 11; Hix v. Whittemore, 4 Met. 545; Staples v. Wellington, 58 Me. 453; Halley v. Webster, 21 Me. 461; McMasters v. Blair, 29 Penn. St. 298; 7 Gill, 10. And see *supra*, 122, 127. Some derangement of a mere temporary nature raises no strong presumption adverse to the will, and sometimes no such presumption at all. Since incapacity just when the will was made is the true issue, proof that the testator was insane years after its execution is of very trivial consequence. Kendrick's Estate, 62 P. 605, 130 Cal. 360; Taylor v. Cresswell, 45 Md. 422.

There is, therefore, no such unqualified presumption of law as "once insane, always insane"; but the peculiar circumstances connected with the malady of the individual testator must be considered in deciding its effect upon the burden of proof, or determining how far the same condition of mind may be inferred at any later or earlier period. Hix v. Whittemore, 4 Met. 545; Taylor v. Pegram, 151 Ill. 106, 37 N. E. 837.

<sup>4</sup> *Supra*, 77, 112; 17 Ala. 84; Stubbs v. Houston, 33 Ala. 555; Graham v. Deuterman, 69 N. E. 237, 206 Ill. 378; Perkins v. Perkins, 90 N. W. 55, 116 Iowa, 253; 4 Rawle, 356; 7 Bush, 491; 63 N. H. 448; 138 Mo. 197, 38 S. W. 932, 39 S. W. 771; Stutsman v. Sharpless, 101 N. W. 105, 125 Iowa, 335. One may dispose according to a rational purpose of his own, although such purpose appears irrational to others. Warren v. O'Connell, 62 S. W. 890, 23 Ky. Law 260.

<sup>5</sup> Thus, where the will was written out entirely by the testator's own hand, this fact bears greatly in its favor. Yet wills clearly expressed in the testator's own handwriting have been set aside on proof of his insanity. *Supra*, 113. We have seen that a testator may be irritable in temper, morose, profane, miserly, squalid, dishonest, devoid of affection, proud, selfish, and yet, being sane, his will cannot be impeached; at the same time that all such manifestations, at and about the time of the testamentary act, may, especially if indicating a sudden perversion of the mind from its natural channel, be shown in connection with other facts, as tending to prove insanity. *Supra*, 77, 158; Conely v. McDonald, 40 Mich. 150. We have seen that mere eccentricity

189. **The burden to establish a lucid interval or mental restoration** rests, therefore, upon the party who asserts it.<sup>1</sup> One who offers the will of a testator shown mentally incapable should show, therefore, that the incapacity was, at least, so far removed when the instrument was executed that his reason shone out once more in the transaction.<sup>2</sup>

190. **Where only monomania is shown at the trial** instead of general insanity, the will ought to stand, unless the delusion, the monomania, colored, so to speak, the testamentary transaction, and made its particular disposition in effect the product of a deranged mind.<sup>3</sup> The burden of proving capacity requires those who propound the will, at all events, to overcome whatever tends to prove that the delusion and the testamentary disposition were connected.<sup>4</sup>

is not insanity; and yet eccentric freaks may be a symptom of insanity. *Supra*, 152; 5 Redf. 529; Jacobs' Succession, 34 So. 59, 109 La. Ann. 1012. We have seen that one may make a valid will who does not manage his business affairs; and yet incapacity to manage one's affairs is a circumstance for consideration. *Supra*, 70; Errickson v. Fields, 30 N. J. Eq. 634. We have seen, in fine, that the intellect may flare wildly or burn low in the socket; and yet that a testator has sufficient mental capacity to make a will when he understands fully and in detail, without prompting, what he is doing and how he is doing it, what is his property and how he wishes to dispose of that property among those naturally entitled to his bounty; or, in other words, so long as he has sufficient intelligence to understand and appreciate the testamentary act in its different bearings, and no longer. *Supra*, 70, 71; Banks v. Goodfellow, L. R. 5 Q. B. 567; Delafield v. Parish, 25 N. Y. 10; 42 Barb. 274.

The circumstances in *Delafield v. Parish* (1857-1862) are worth observing; that case being a remarkable one, as putting a practical limit to testamentary capacity which American courts have not since been disposed to transgress, though some had transgressed it before.

<sup>1</sup> *Supra*, 110, 122; Saxon v. Whitaker, 30 Ala. 237; 44 N. J. Eq. 154, 15 A. 391.

<sup>2</sup> While no precise measure of proof is set by the law, there must be sufficient to overcome that unfavorable impression which is naturally produced when habitual insanity has been shown to have once existed. *Supra*, 110, 111; 5 Rich. 212. Lucid intervals involve too slight and wavering a departure from confirmed derangement of the intellect to serve as a very positive basis for testamentary capacity to rest upon: while proof that the testator had actually recovered his full mental health after the period of incapacity and before the will was made, well overcomes any presumption of insanity. Yet it should be still observed that those once confirmed in this malady, however restored they may appear, are liable to a relapse when some new calamity comes with crushing weight or the faculties decay in the torpor of declining years.

<sup>3</sup> It is true that the mental disorder in question may have extended beyond its outward and visible symptom; and that the insane delusion once shown to exist, a prejudice is created against the will. But the most decisive circumstance against the will, in such a situation, would be that it was unnatural, inofficious, insane in character, tinged by the delusion to the injury of survivors. *Supra*, 157-160; Fraser v. Jennison, 42 Mich. 206; Mullins v. Cottrell, 41 Miss 291; 60 Ga. 193; 38 Ala. 131; Jenckes v. Smithfield, 2 R. I. 255.

In cases of spiritualism, etc., evidence of the truth or falsity of the faith is inadmissible. 149 Mich. 152, 112 N. W. 736, 10 L. R. A. (N. S.) 989, 119 Am. St. Rep. 662. See 49 A. 620, 93 Md. 442, as to religious vacillation.

<sup>4</sup> *Smee v. Smee*, 5 P. D. 84.

191. **Proof of longer or shorter incapacity from drunkenness** should not destroy the usual presumption of general capacity from a proper execution, but the party alleging incapacity should bring his proof to bear more directly upon the time of execution.<sup>1</sup>

192. **The whole personal history of the testator, mental and physical,** may be freely ranged over upon the issue of his insanity.<sup>2</sup> And as insanity is often hereditary and the taint transmitted through one's ancestors, it is not impertinent on a direct issue to inquire into the sanity of his immediate progenitors or others of the family not remote.<sup>3</sup>

193. **Declarations of the testator made at or about the time of its execution,** and his conduct, are admissible as part of the *res gestæ* when the question is of testamentary capacity.<sup>4</sup> But his declarations made long after the will was executed, as, for instance, two years, are too remote in time to be admissible on this point;<sup>5</sup> and so are his declarations made long before the execution.<sup>6</sup> To letters of the decedent a like principle applies. Such testimony cannot be strained to a remote purpose; and yet clear, sensible, and perfectly coherent letters written by the testator shortly before and after making the will should bear strongly in favor of his general capacity, if such capacity be at issue or to show that he knew the contents of the will.<sup>7</sup> And so may his business papers,

<sup>1</sup> 3 Hill (S. C.), 68; 184 Penn. St. 41, 39 A. 16; 3 N. J. Eq. 604; *supra*, 125-128; Elkinton v. Brick, 44 N. J. Eq. 154, 15 A. 391. As to proof of mere intemperate habits see 1 Redf. 454; 27 N. Y. 9, 84 Am. Dec. 220; 2 Harring. 375; Swygart v. Willard, 76 N. E. 755, 166 Ind. 25. As to inquest found see 56 Penn. St. 370; 50 Barb. 645.

<sup>2</sup> 45 Iowa, 145; Shailer v. Burnstead, 99 Mass. 119; Wright v. Tatham, 5 Cl. & F. 670; Dale's Appeal, 57 Conn. 127; Bever v. Spangler, 93 Iowa, 576, 61 N. W. 1072. If one side takes a wide range, at the trial, still more readily may the other. 176 Ill. 448. But see 51 A. 398, 94 Md. 403.

<sup>3</sup> The value of this latter evidence appears to depend upon its immediate connection with the testator's own condition, as shown by medical experts; and where the malady cannot be traced directly in the blood, but the ancestor was collateral or remote, or his mental disorder by no means coincident with that of the testator, such proof can be of very slight consequence. Baxter v. Abbott, 7 Gray, 71; Snow v. Benton, 28 Ill. 306; 86 Mo. 283 (testator's conduct, habits, manners, etc.); Fraser v. Jennison, 42 Mich. 206. Irrelevant evidence is not on such points admissible. 127 Penn. St. 564, 18 A. 432; Berry v. Trust Co., 53 A. 720, 96 Md. 45; Pringle v. Burroughs, 78 N. E. 150, 185 N. Y. 375. As to report of an autopsy, see La Bau v. Vanderbilt, 3 Redf. 384 (not primary proof).

<sup>4</sup> 4 Redf. 455; May v. Bradlee, 127 Mass. 414; Boylan v. Meeker, 28 N. J. L. 274; Colvin v. Warford, 20 Md. 357; McTaggart v. Thompson, 14 Penn. St. 149; Gibson v. Gibson, 20 Mo. 227, 64 Am. Dec. 178; 42 Ill. 376; 47 Conn. 450; Bever v. Spangler, 93 Iowa, 576, 61 N. W. 1072; Heseman v. Vogt, 55 N. E. 151, 181 Ill. 400.

<sup>5</sup> La Bau v. Vanderbilt, 3 Redf. 384; Fraser v. Jennison, 42 Mich. 206.

<sup>6</sup> Cf. Langford's Estate, 108 Cal. 608, 41 P. 701; Bower v. Bower, 142 Ind. 194, 41 N. E. 523.

<sup>7</sup> Wheelock's Will, 56 A. 1013, 76 Vt. 235; Baker v. Baker, 67 N. E. 410, 202 Ill. 595; Blakely's Will, 48 Wis. 294. Letters written to a testator, and traced to his

at or about the time of executing the will, be produced in evidence.<sup>1</sup> Not only as part of the transaction are the declarations, oral or written, of the alleged testator thus admissible upon an issue of *devisavit vel non* ("will or no will"), but they may be received when the condition of the testator's mind is the point of contention, or it becomes material to show the state of his affections.<sup>2</sup>

194. Some miscellaneous points as to evidence in issues of mental capacity may be noted.<sup>3</sup>

possession, afford of themselves no proof of his capacity unless knowledge or act of the testator with regard to those letters can be shown. *Wright v. Tatham*, 5 Cl. & F. 670; 7 A. & E. 313. See *McNinch v. Charles*, 2 Rich. 229.

<sup>1</sup> *Messner v. Elliott*, 184 Penn. St. 41, 39 A. 46. And see *Ray v. Ray*, 98 N. C. 566, 4 S. E. 526 (as to holding an office and discharging its duties).

<sup>2</sup> In all such cases, the evidence is properly admitted simply as external manifestations of a testator's mental condition, and not as evidence of the truth or falsity of the facts he states. This seems the general doctrine, although the cases are somewhat in conflict upon this point. See *Gibson v. Gibson*, 20 Mo. 227, and authorities cited; 2 Johns. 31, 3 Am. Dec. 390; 5 Bing. 435; *Moritz v. Brough*, 16 S. & R. 405; *Canada's Appeal*, 47 Conn. 450; 84 Mo. 587; *Roche v. Nason*, 185 N. Y. 128, 77 N. E. 1007 (not favored); 95 S. W. 189, 117 Tenn. 73; *Credille v. Credille*, 51 S. E. 628, 123 Ga. 673, 107 Am. St. Rep. 157; *Swygart v. Willard*, 76 N. E. 755, 166 Ind. 25; 60 N. E. 223, 167 N. Y. 28; *Crowson v. Crowson*, 72 S. W. 1065, 172 Mo. 691; *Roberts v. Bidwell*, 98 N. W. 1000, 136 Mich. 191; *Knox's Will*, 98 N. W. 468, 123 Iowa, 24. For as with deeds so with wills, the parties making them cannot impeach them by their own parol declarations, prior or subsequent to the execution; and evidence thereof is not admissible upon the issue of validity. *Gibson v. Gibson*, *supra*; 42 Ill. 376. But cf. *Flowers v. Flowers*, 85 S. W. 242, 74 Ark. 212. Courts sometimes indulge all such proof, yet it has the objection of hearsay testimony. See 243 *post* as to testator's declarations in an issue of undue influence.

It is obvious that if one cannot lawfully revoke a former will because of his present insanity, his insane declaration as to former mental condition should be utterly worthless as testimony of the fact to impeach it. But mental disturbance may be detected by declarations as surely as by conduct; and hence the declarations of persons charged with insanity are admissible, in a chain of logical connection, to elucidate the mental condition existing when the will in question was executed. But if they have no tendency to show contemporaneous capacity or incapacity, they are inadmissible.

<sup>3</sup> Rumors among a testator's neighbors, or general reputation as to whether he was of unsound mind or not, are inadmissible proof in the present connection. *Wright v. Tatham*, 5 Cl. & F. 670, 735; *Townsend v. Pepperell*, 99 Mass. 40; *Brinkman v. Rueggiesick*, 71 Mo. 553; *Roche v. Nason*, 93 N. Y. S. 565 (family hearsay); *Vance v. Ubson*, 66 Tex. 476, 1 S. W. 179. As to conversations in the testator's presence concerning his mental condition, see 74 Iowa, 352, 37 N. W. 773; *Knox's Will*, 98 N. W. 468, 123 Iowa, 24. As evidence to invalidate or corroborate a will, the age of the testator and his bodily state, his condition and circumstances, his known affections and preferences, and the correspondence or contradiction of the will to these affections, the manner of making the will or codicil, the persons around him at the time, their capacity and credibility,—all such matters under reasonable restraint to the point at issue may properly go to the jury, or to the judge who tries the case. 5 Harr. 459, 80 N. E. 289; 225 Ill. 394, 116 Am. St. Rep. 145. Business transactions performed by the testator about the time of making his will have been admitted in evidence, as indicative of his mental capacity. *Kerr v. Lunsford*, 31 W. Va. 659; 64 N. H. 573; 98 N. C. 566, 45 S. E. 526. And as to written business agreements of the party, see 184 Penn. St. 41, 39 A. 46. Evidence of non-experts as to business capacity excluded. *Trubey v. Richardson*, 79 N. E. 592, 224 Ill. 136.

Evidence is relevant and admissible which tends to show that the will presented is in conflict with the fixed purposes previously expressed by the testator. *Seale v. Cham-*

195. **As to parties interested under the will**, declarations made by them before its execution are not admissible against the validity of the will.<sup>1</sup> But upon the question whether declarations, admissions, or conversations, made by a devisee or legatee in the nature of an admission against his own interest or a confession are competent testimony, the decisions are not uniform.<sup>2</sup>

196. **Witnesses who testify upon the delicate manifestations of mental capacity** ought, besides being truthful, to be persons of great credit on such points, and, moreover, such as have had good opportunity to observe the particular testator.<sup>3</sup>

197. **As a rule witnesses may state facts fully so far as their observation extended**, but not give opinions outside the range of their peculiar training and experience.<sup>4</sup> As for the issues of testamentary capacity, it requires men of legal training to estimate their legal bearing, and men of medical training in a peculiar direction to detect the finer shades of mental disorder; yet most persons of sense and good feeling deem themselves capable of appreciating

bliss, 35 Ala. 19. On the other hand, it is strong evidence of capacity to make the will, that its provisions are suitable, and made in accordance with determinations previously expressed by the testator while clearly sane. *Couch v. Couch*, 7 Ala. 519, 42 Am. Dec. 602. And see 152 Mass. 470, 25 N. E. 837; *Hammond v. Dike*, 42 Minn. 273, 44 N. W. 61, 18 Am. St. Rep. 503; 76 Tex. 574, 13 S. W. 543. See *Hall v. Perry*, 87 Me. 569, 33 A. 160, 47 Am. St. Rep. 352.

<sup>1</sup> *Ames, Re*, 51 Iowa, 596, 2 N. W. 408.

<sup>2</sup> Some States permit such declarations to be shown; while in other States the better opinion is that such declarations are inadmissible unless the party making them is the sole beneficiary under the will, for the reason that other devisees or legatees may be injuriously affected by the admission of such testimony. 8 Greenl. 42; 1 Pick. 192; 1 B. Mon. 399; *Brown v. Moore*, 6 Yerg. 272; *Thompson v. Thompson*, 13 Ohio St. 356; *Blakey v. Blakey*, 33 Ala. 611; *Ames' Will, Re*, 51 Iowa, 596, 2 N. W. 408; 99 Iowa, 120, 68 N. W. 591; *Clark v. Morrison*, 25 Penn. St. 453; *Forney v. Fennell*, 4 W. Va. 729; *How v. Pullman*, 72 N. Y. 269. For the general rule is that one party whose interest is several ought not to be prejudiced by the unauthorized declarations of another. If the declaration made under no solemnity of an oath be matter of opinion rather than of fact, there is all the more reason for excluding it. 1 Pick. 192; *Dale's Appeal*, 57 Conn. 127, 17 A. 757, and cases cited.

<sup>3</sup> 1 Redf. Wills, 137. But persons whose testimony is founded upon so ample and skilful experience are rarely to be found; or else, being of the family, they have some pecuniary interest either in breaking or upholding the will. The family doctor, if there be one, unbiased and of sound judgment, who made the patient's case his careful study in advance of any controversy, combines these requisites in the highest degree. But such an investigation in court calls commonly for a full detail of the facts bearing upon the testator's sanity from unprofessional witnesses, and the discussion and estimation of those facts before the jury, aided by the opinions of a class of men professionally conversant with insane symptoms, and qualified as experts to impart instruction on such an issue. *Ib.*

<sup>4</sup> Yet the habit of generalizing upon facts is universal; and within a certain compass every intelligent person's opinion will be found valuable. An illiterate man's judgment of weather phenomena, of crops, of forest animals and their trails, may far surpass a scholar's; but only a scholar can discuss questions pertaining to true science, universal language or history. Learned or unlearned, we are all keen observers of character where we are familiar.



whether those of their own family and acquaintance are out of their heads or not. Hence the doubt and uncertainty in our law as to whether ordinary witnesses can give their opinions upon the point of a testator's insanity, even admitting<sup>1</sup> that on subjects where training and skill are needful they cannot. That legal doubt and uncertainty let us briefly investigate.

198. **The subscribing witnesses to a will, even though not experts nor even familiar** with the testator's habits and character, may testify as to his apparent sanity or insanity at the date of their subscription.<sup>2</sup> And by admitting unreservedly the opinions of such persons on this point, the law at once refuses to affirm that none but experts are competent to pronounce upon the broad fact of one's mental soundness or unsoundness.<sup>3</sup> Yet, as we have seen, the expression of such an opinion by subscribing witnesses is by no means indispensable in establishing a will; for, even though any or all the witnesses should be dead or beyond the reach of process, or wholly forgetful of the circumstances attending the attestation, or otherwise incapable of aiding a just conclusion in court on the question of sound or unsound mind, this issue might be determined and the will admitted or probate refused without them.<sup>4</sup> And certainly the testimony of subscribing witnesses on this point is by no means conclusive, but may be rebutted by other evidence to the contrary.<sup>5</sup>

<sup>1</sup> *Irving v. Bruen*, 79 N. E. 1107, 186 N. Y. 605.

<sup>2</sup> 7 Pick. 94; 99 Mass. 624; *May v. Bradlee*, 127 Mass. 414; 34 Me. 162; *Robinson v. Adams*, 62 Me. 369, 16 Am. Rep. 473; 9 N. Y. 371; 34 N. Y. 190; 90 Am. Dec. 681; *Logan v. McGinnis*, 12 Penn. St. 27; *Duffield v. Morris*, 2 Harring. 375; *Appleby v. Brock*, 76 Mo. 314; 9 Yerg. 329; *Beaubien v. Cicotte*, 12 Mich. 459; 7 Gill, 10; *Turner v. Cheesman*, 15 N. J. Eq. 243; *Kaufman v. Caughman*, 49 S. C. 159, 27 S. E. 16.

<sup>3</sup> The reason why subscribing witnesses are thus allowed to express an opinion of the testator's sanity is, to use the language of a Massachusetts judge, "because that is one of the facts necessary to the validity of the will, which the law places them around the testator to attest and testify to." Gray, J. (afterwards Chief-Justice of Massachusetts, and Associate Justice of the Supreme Court of the United States), in *Hastings v. Rider*, 99 Mass. 624. And see opinion in *Appleby v. Brook*, 76 Mo. 314. See 120 Ill. 597, 12 N. E. 236 (statute).

<sup>4</sup> See *Cilley v. Cilley*, 34 Me. 162; *supra*, 175.

<sup>5</sup> 34 Me. 163; 1 N. Y. Supr. 351; *Orser v. Orser*, 24 N. Y. 51; *supra*, 175. For the weight and force to be given to the opinion of any subscribing witness regarding the testator's capacity depends, as in the case of other witnesses, upon the extent of his actual knowledge in this direction and the opportunities afforded for forming his opinion. *Turner v. Cheesman*, 15 N. J. 243; 1 N. Y. Supr. 351; 4 Wash. C. C. 262. It is true that the subscribing witness may state his belief as to the testator's soundness of mind without first showing the grounds upon which that belief was based; but all the facts seen or known by him at the time are proper subjects of inquiry by either party, and ought to be elicited whenever there is a controversy. *Logan v. McGinnis*, 12 Penn. St. 27; 34 Me. 162. When these facts are elicited, it will often appear that the subscribing witness had very little foundation for an opinion upon the subject. Never-

199. Whether other witnesses, who are not experts, may likewise state their opinion concerning the testator's sanity is a question upon which our courts do not agree. In Massachusetts, whatever may be the rule elsewhere, it is repeatedly held that the witnesses to the will, the family physician who has been medical adviser of the deceased, and witnesses who are qualified as experts in the knowledge of mental disease, are alone competent in contests of this character to give their opinions in evidence. The testimony of other witnesses is confined to a statement of the facts and declarations, manifesting mental condition, of which they have knowledge.<sup>1</sup>

theless, our courts give every subscribing witness the full benefit of the trust which the maker of the will has obviously placed in him, and refuse to limit his expression of an opinion by any preliminary inquiry as to whether he had good ground for forming one. *Robinson v. Adams*, 62 Me. 369, 16 Am. Rep. 473.

A subscribing witness who testifies against the capacity of the testator is not only open to disproof by the proponent of the will, but may be impeached by other testimony, tending to discredit his veracity. Merely because one is a subscribing witness, his opinion is entitled to no greater weight than it really deserves. *Thornton v. Thornton*, 39 Vt. 122; *Stirling v. Stirling*, 64 Md. 138, 21 A. 273. A subscribing witness's testimony is not unfrequently discredited. *Supra*, 175-180.

<sup>1</sup> *Hastings v. Rider*, 99 Mass. 622, and cases cited; *Nash v. Hunt*, 116 Mass. 414. Even the subscribing witness is restrained to his opinion when the will was executed. *Williams v. Spencer*, 150 Mass. 346, 23 N. E. 105, 5 L. R. A. 790, 15 Am. St. Rep. 206. Nevertheless, it is conceded by the courts of this State that in eliciting the testimony of witnesses unskilled and hence not competent to give an opinion of the testator's mental condition, practical difficulty is found in confining them to material facts and preventing the direct or indirect expression of an opinion. It is not easy for most witnesses to "distinguish between matters of fact and opinion on this subject; between the conduct and traits of character they observe and the impression which that conduct and those traits create." *Baxter v. Abbott*, 7 Gray, 71, 79; *Ellis v. Ellis*, 133 Mass. 469. For an illustration of this difficulty upon an equivocal question put to a witness, see 127 Mass. 414. Indeed, the latest Massachusetts decisions disclose less confidence than formerly in the propriety of suppressing unprofessional opinions on such matters. Thus, upon the issue of a testator's sanity, persons acquainted with him, although neither attesting witnesses nor medical experts, have been allowed to testify whether they noticed any change in his intelligence or any want of coherence in his remarks, or anything unsound or singular in his mental condition. *Barker v. Comins*, 110 Mass. 477; *Nash v. Hunt*, 116 Mass. 237. In both these cases the Supreme Court ruled that such inquiries related to facts, not opinions; which only serves to show to what subtle distinctions the doctrine is at last reduced. If testifying thus to the appearance of the testator is not giving the witness's own opinion as the result of his personal observation, it comes certainly very close to it. Upon some opinions of eminent judges in this State well expressed, the whole subject might be re-opened by assailing the main position that mental soundness in a given case is a condition of which medical men and experts are necessarily better capable of judging upon theory than those personally familiar with the patient upon long and habitual observation of his individual traits and peculiarities; and recalling, furthermore, that many of the facts and appearances upon which an observer bases his intelligent opinion of insanity cannot be so vividly reproduced by the cleverest of mimics that a jury could pass upon the case with equal facility. See *Baxter v. Abbott*, 7 Gray, 71, 79; *Commonwealth v. Sturdivant*, 117 Mass. 122; *Clark v. Clark*, 168 Mass. 523, 47 N. E. 510.

200. In a few other states the opinions of general witnesses who are neither medical men, experts, nor subscribing witnesses, have been ruled out as incompetent where the sanity of the testator is at issue.<sup>1</sup>

201. On the other hand, the great preponderance of American decisions favors admitting generally the testimony of persons, professional or unprofessional, as to matters of personal observation bearing upon the testator's sanity, without attempting to discriminate closely between facts and opinions; subject, of course, to cross-examination. And in most States an unprofessional witness never was, or else is no longer, confined to a recital of facts from which the jury must draw unaided an inference of sanity or insanity, but he may give his opinion touching the testator's sanity as the result of his own observation and familiarity.<sup>2</sup>

<sup>1</sup> As in Maine. *Wyman v. Gould*, 47 Me. 159; 21 Me. 461. But cf. *Robinson v. Adams*, 62 Me. 159, 16 Am. Rep. 410. And in Texas. *Gehrke v. State*, 13 Tex. 568. And in Alabama. *Torrey v. Burney*, 113 Ala. 496, 21 S. 348. So until recently in New Hampshire; but in that State the courts have at length reversed this rule, impressed with the practical difficulty which attends the separation of fact from opinion where evidence is given touching the mental condition of a deceased person. *Hardy v. Merrill*, 56 N. H. 227, 22 Am. Rep. 441, which adopts the dissenting opinion of *Doe, J.*, in *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533; 64 N. H. 573. Cf. 47 N. H. 120.

In New York the general rule was once announced by a divided court in substantial accord with the Massachusetts doctrine: namely, so as to confine general witnesses to the statement of facts only, where the issue of insanity was raised. *DeWitt v. Barley*, 9 N. Y. 371. But the authority of that case was afterwards shaken; and it was declared that here, as in other instances where the minute appearances cannot be so perfectly described that a jury may draw a just conclusion from them, opinions drawn from personal observations are admissible in evidence from necessity. 17 N. Y. 340; *Clapp v. Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681; *O'Brien v. People*, 36 N. Y. 276. The rule of that State, as more lately declared, is, that the general witness when examined as to facts within his own knowledge and observation which tend to show the soundness or unsoundness of the testator's mind, may characterize as rational or irrational the acts and declarations to which he testifies, and show the impression they produced upon him; but that, being an observer and not a professional expert, he cannot go beyond his conclusions from the specific facts he discloses, nor express his opinion on the general question whether the mind of the testator was sound or unsound. 34 N. Y. 190, 9 Am. Dec. 651; *Rider v. Miller*, 86 N. Y. 507.

<sup>2</sup> *Hardy v. Merrill*, 56 N. H. 227, 22 Am. Rep. 441, and cases elaborately reviewed; *Dunham's Appeal*, 27 Conn. 192; 4 Conn. 203 10 Am. Dec. 119; *Cram v. Cram*, 33 Vt. 15; 17 Vt. 499, 44 Am. Dec. 349; 7 S. & R. 90, 10 Am. Dec. 444; 23 Penn. St. 117; 68 Penn. St. 342, 81 Am. Rep. 181; 110 Ind. 337; *Eddey's Appeal*, 109 Penn. St. 406; *Loughney v. Loughney*, 87 Wis. 92, 58 N. W. 250; 70 P. 156, 18 Col. App. 85; *Clary v. Clary*, 2 Ired. 78; 7 Gill, 10; *Weems v. Weems*, 19 Md. 334; *Dennis v. Weekes*, 51 Ga. 24; 13 Ala. 68; *Stubbs v. Houston*, 33 Ala. 555; *Appleby v. Brock*, 76 Mo. 314; *Beaubien v. Cicotte*, 12 Mich. 499; *Ryman v. Crawford*, 86 Ind. 262; 9 Yerg. 329; *Runyan v. Price*, 15 Ohio St. 1, 86 Am. Dec. 459; *Brooks's Estate*, 54 Cal. 471; *Severin v. Zack*, 55 Iowa, 28, 7 N. W. 404; *American Bible Society v. Price*, 115 Ill. 623, 5 N. E. 126; *Meeker v. Meeker*, 74 Iowa, 352, 7 Am. St. Rep. 489, 37 N. W. 773. Why, indeed, the non-expert subscribing witness should be so highly privileged in this respect above the non-expert general witness who knew well the business and social habits of the testator at the time when the will was made, courts fail

202. In the English ecclesiastical courts, as at the civil law, there appears to have been no strict exclusion of matters of opinion, where the testimony of unprofessional witnesses was taken upon the question of mental soundness as affecting a will.<sup>1</sup>

203. But restrictions upon general opinions here are admissible; and the opinion of one who is neither an expert nor a subscribing witness should not be received except in connection with the facts upon which that opinion is based.<sup>2</sup> And it seems entirely proper to question this general witness first as to what he has actually observed for himself concerning the testator's sanity, in order to lay a foundation for excluding or discrediting any opinion he may entertain.<sup>3</sup>

to readily apprehend. 2 Ired. 78, approved in *Appleby v. Brock*, 76 Mo. 314, 317. But it deserves to be said that witnesses present at the very act of execution, whether subscribing witnesses to the will or not, are brought so immediately into contact with the transaction in question that their opinions ought to be of especial value in such controversies. Comparing together the non-expert witness with his facts and the expert without them, it has well been said that the judgment of a witness founded on actual observation of the capacity, disposition, temper, character, peculiarities of habit, form, features, or handwriting of others, is more than a mere expert opinion. It approaches to knowledge, and in fact is knowledge, so far as the imperfection of human nature will permit knowledge of these things to be acquired, and such knowledge is proper evidence for the jury. *Dunham's Appeal*, 27 Conn. 192. See 3 Mass. 330, as to testifying "to the appearance." 1 Redf. Wills, 144, note. Hence persons present when the will was executed and having as good opportunities of observation and as little bias as the subscribing witnesses themselves, should be credible. *Brown v. Mitchell*, 75 Tex. 9. See 59 Conn. 226, 22 A. 82, 21 Am. St. Rep. 85; 97 Iowa, 192, 66 N. W. 99 (a stenographer); 189 N. Y. S. 543.

Let us in this connection remark how often the conviction of mental unsoundness is forced upon the familiar observer in a given case by little signs, like a roving eye, a strange tone of the voice, uneasy gestures, something unnatural in the individual that those who know his usual moods perceive quickly but cannot fully detail. So is it, too, with intoxication; how slowly, in many instances, is that condition perceived by strangers in a mixed company, while the searching glance of an anxious friend or kinsman detected, the instant the drinker entered the room, not only that he had been drinking but how drunk he was. What gave the impression it would be hard to say and harder still to reproduce; but the certainty of that impression is not to be shaken. Nature trains us all to observe the lurking expressions, the moods, the habits and disposition of those about us: this is prompted in a degree by the instinct of affection, of self-preservation; and when one we have long watched shows signs of disease, of mental malady, or simply of settled aversion, the mind notes much that cannot be drawn out at a trial by question and answer; but what one asserts of the individual most confidently is, that he was not like himself, and to that opinion one holds firmly. And on the whole it seems better that the court should allow such opinions to be stated together with the facts, and test their accuracy by a cross-examination as to the grounds on which they were based, and the character and bias of the witness himself, than to shut out from the jury one of the most important means of eliciting the truth where death necessitates that all evidence upon the issue of mental condition must be of a secondary sort and without a personal inspection.

<sup>1</sup> *Hastings v. Rider*, 99 Mass. 624, *per* Gray, J.; *Wright v. Tatham*, 5 Cl. & Fin. 692. As to the common law rule there is some doubt. *Ib.*; *State v. Pike*, 51 N. H. 185, *per* Doe, J.

<sup>2</sup> *Pidcock v. Potter*, 68 Penn. St. 342; *Roberts v. Trawick*, 13 Ala. 68 (only those of long and familiar acquaintance); 87 N. C. 477.

<sup>3</sup> For in order to be received in court, or carry weight, the opinion of a non-expert witness must not be derived from what others have witnessed, nor from rumor or

204. The opinion of a physician or skilful attendant on the question of a testator's sanity is entitled to great weight, especially if such person regularly attended the testator at and about the time when the alleged will was executed.<sup>1</sup>

205. As an expert, a physician's testimony takes a much wider range; for thus his general belief as to whether the testator was sane or insane may be freely elicited without being confined to the impressions derived from what he personally witnessed; and he may express a professional opinion upon the facts embodied in the testimony of other witnesses without being confined to matters of his own personal observation.<sup>2</sup> In general, the courts have refused

hearsay, nor from any hypothetical statement of the case, but it should be founded upon his own actual knowledge and observation of the testator's appearance and conduct, with fair opportunity of judging. *Cram v. Cram*, 33 Vt. 15; *Dunham's Appeal*, 27 Conn. 192; *Hardy v. Merrill*, 56 N. H. 227, 22 Am. Rep. 441; 29 Hun. 272; *Beaubien v. Cicotte*, 12 Mich. 499; *Appleby v. Brock*, 76 Mo. 314; 9 Yerg. 329; *Turner v. Cheesman*, 15 N. J. Eq. 243; *Garrison v. Garrison*, ib. 266; 72 Iowa, 84, 33 N. W. 374. Neighbors and friends of the testator, as well as those of his own household and family, persons who have long known and dealt with him, and conversed with him before and after the execution of his will, may, under such a rule, be found quite competent to entertain an opinion touching his sanity. See *Ryman v. Crawford*, 86 Ind. 262; 87 N. Y. 514. But the more constant and familiar the acquaintance, the more trustworthy of course is the testimony, all other things being equal. And while the better rule does not prescribe long intimacy as the indispensable condition upon which a general witness may run from fact into opinion in giving his testimony, nor fix the precise *quantum* or character of one's acquaintance with the deceased,—for the court should in such cases be allowed much latitude of discretion, according to the circumstances,—it is undoubtedly true that the naked or ill-founded opinion of a general witness, or mere casual acquaintance, in regard to the testator's sanity, being entirely worthless should be equally inadmissible as evidence. See 12 Mich. 459; 17 Vt. 502; *Eckert v. Flowry*, 43 Penn. St. 46 (acquaintance begun after the will was executed is irrelevant); 15 N. J. 202; 7 Md. 65; *Brooke v. Townshend*, 7 Gill, 10; 3 Mass. 330; *Grand Lodge v. Wieting*, 168 Ill. 408, 61 Am. St. Rep. 123, 48 N. E. 59. No precise time or character of previous acquaintance can be laid down as a fixed rule; much depends upon the kind and degree of mental malady. *Powell v. State*, 25 Ala. 21. As to a judge's liberal discretion in admitting such testimony, see 117 Mass. 122; 121 Ill. 376; *Glass's Estate*, 127 Iowa, 646. For the impression made upon the mind of an intelligent witness by what he has observed in the conduct, manner, bearing, conversation, and acts of another may be of great help to a jury; but far otherwise the impression produced by hearsay, prejudice, or idle gossip.

<sup>1</sup> Under that principle already discussed, which most States favor, the opinion of any physician grounded upon his own opportunities of observation would be competent evidence, while his professional knowledge gives that opinion far greater force. *Cheatham v. Hatcher*, 30 Gratt. 56; 35 Vt. 398; *Struth v. Decker*, 59 A. 727, 100 Md. 368; *Baxter v. Abbott*, 7 Gray, 71; *Kempsey v. McGinniss*, 21 Mich. 123; 2 Harring. 385; *Frary v. Gusha*, 59 Vt. 257, 9 A. 549. An attending physician who is also a subscribing witness may be freely cross-examined. *Mullin, Re*, 110 Cal. 252, 42 P. 645. And so, too, with any skilful nurse or attendant whose narrative of the case, accompanied by the personal impressions received from the patient's acts and behavior, should deserve high consideration. *Brown v. Riffin*, 94 Ill. 560; *Fairchild v. Bascomb*, 35 Vt. 398. Special training and experience might place one on this privileged footing; and schools for nurses are a modern establishment. See also *Toomes's Estate*, 54 Cal. 509, 35 Am. Rep. 83 (spiritual adviser's opinion specially admitted); 76 Mo. 314; 89 N. Y. S. 543 (senile dementia case).

<sup>2</sup> Insanity, in modern times, is treated in asylums and by physicians who make a specialty of this malady. Yet the intimate knowledge of facts derived by the phy-

to distinguish between different members and different schools of the medical profession. And they appear to place educated and practising physicians generally upon the high plane of medical experts in testamentary causes where the issue of mental soundness is raised; drawing no bold line, as it would seem, between specialists on this subject and others of regular standing in the profession,<sup>1</sup> but discriminating as circumstances may require.<sup>2</sup>

206. **The opinion of an expert concerning the sanity or insanity of a testator is generally admissible** so long as its grounds are explained, whether as founded upon his own observation and examination of the patient, or upon a hypothetical case involving the facts which the evidence in the case appears to have disclosed, or as the combined result of his own observation and the other testimony adduced at the trial.<sup>3</sup>

207. **But there are limitations** to all such expert testimony.<sup>4</sup>

sician in an individual case under his professional treatment may be a fair offset to a specialist's knowledge acquired elsewhere. Great respect certainly is paid by our courts to the opinions of all educated practising medical men upon subjects of medical science. 7 Gray, 71; *Hastings v. Rider*, 99 Mass. 622. That one's experience was less than another's of the profession is held insufficient ground for ruling him out; the difference being rather in the weight of testimony than the competency of the testimony. *Ib.*

<sup>1</sup> 3 Wash. C. C. 580, 587; *Fairchild v. Bascomb*, 35 Vt. 398; 7 Gray, 71; 12 Ala. 650; 14 Gratt. 592; *Cheatham v. Hatcher*, 30 Gratt. 56, 32 Am. Rep. 650; *Duffield v. Morris*, 2 Harring. 385; 6 Ga. 324; 9 Yerg. 29. We here confine ourselves to testamentary cases, disregarding issues of sanity in criminal cases. Cf. remarks in 21 Mich. 123, 137.

<sup>2</sup> The aid imparted by physicians here extends, therefore, by judicial consent, beyond the usual range of opinions or impressions formed as the result of one's actual observation; nor in practice would a professional man treat a case without investigating facts and symptoms related by others, and basing his opinion upon their narrative as tested by his own judgment and personal inspection. Any responsible opinion imports, in truth, wider and deeper reaching for facts than an irresponsible one. See observations of the court in *Harrison v. Rowan*, 3 Wash. C. C. 587, and in *Kempsey v. McGinniss*, 21 Mich. 123. All such testimony is subject to cross-examination and the jury should weigh the evidence.

<sup>3</sup> *Baxter v. Abbott*, 7 Gray, 71; *Heald v. Thing*, 45 Me. 392; *Kempsey v. McGinniss*, 21 Mich. 123; 121 Ill. 376, 12 N. E. 267; 142 Ind. 194, 41 N. E. 523; *Bever v. Spangler*, 93 Iowa, 576, 61 N. W. 1072. And see *Yardley v. Cuthbertson*, 108 Penn. St. 395, 56 Am. Rep. 218, as to a hypothetical opinion based upon only a defined portion of the testimony.

<sup>4</sup> Expert opinions as to sanity based on hypothetical facts not appearing to exist in the given case are not admissible; and should the jury fail to find certain manifestations testified to as facts, they should reject whatever opinions were based upon them. *Ames, Re*, 51 Iowa, 596; 49 Iowa, 76; *Kempsey v. McGinniss*, 21 Mich. 123. Nor does a hypothesis framed from a narrow range of facts offer ground for expert opinions of real value. *Andrews, Re*, 33 N. J. Eq. 514. Furthermore, an expert cannot be allowed to give his opinion based partly upon his own observation and examination of the patient, and partly upon the unsworn representations of others, whose accuracy he has not tested for himself. *Wetherbee v. Wetherbee*, 38 Vt. 254; *Heald v. Thing*, 45 Me. 392. Nor can he give an opinion which involves, on his part, the weighing of collateral testimony. *Kerr v. Lunsford*, 31 W. Va. 659. Opinions of physicians and intimate acquaintances at time of execution are not to be overcome by mere hypo-

208. **Opinions as to the testator's sanity should relate**, on the whole, to the time of his examination.<sup>1</sup> Nor should the witness be asked his opinion whether the testator was competent to make a will; for such an inquiry involves matter of law as well as fact, upon which the court may reserve its instructions.<sup>2</sup>

209. **As to matters of opinion, on the whole**, the issue presented in a will concerning mental soundness or unsoundness is not to be decided upon the mere belief of witnesses, however numerous and respectable, but each opinion should be tested by the facts in the case, in order to judge of its probable correctness.<sup>3</sup> Nor is there good ground for saying absolutely that one class of witnesses who testify in the case should be more relied upon than another.<sup>4</sup>

thetical opinions of experts who did not know testator. *Draper's Estate*, 64 A. 520, 215 Penn. 314.

As for medical testimony to facts observed, any physician who gives an opinion based upon his personal experience with the case ought to detail the facts of such experience, as examination or cross-examination may suggest. *Hastings v. Rider*, 99 Mass. 622; 9 Yerg. 29; 21 Mich. 123. See *Collier v. Simpson*, 5 C. & P. 73; *Keith v. Lothrop*, 10 Cush. 453; *Heald v. Thing*, 45 Me. 397. And whether the physician or expert testifies to facts and appearances founded upon his own personal observation and acquaintance with the patient or upon a hypothetical case framed from the testimony adduced at the trial, the facts, symptoms, or appearances upon which his opinion is founded ought to be distinctly drawn out, for upon this presentation depends its intrinsic value. 45 Me. 392; 12 Ohio, 483, 40 Am. Dec. 481; *Gibson v. Gibson*, 9 Yerg. 329; 2 Ired. 78. Cf. *Stubbs v. Houston*, 33 Ala. 555. After all, a mere expert hypothetical opinion touching a question of testamentary capacity is entitled to very little weight in comparison with proof of facts and circumstances founded in personal observation, which carry their own inference. See *Burley v. McGough*, 115 Ill. 11, 3 N. E. 738; *Hall v. Perry*, 87 Me. 570, 33 A. 160, 47 Am. St. Rep. 352; 64 A. 520, 215 Penn. 314; 61 N. Y. S. 910; 80 N. Y. S. 1011. Testimony should be sworn, and mere medical certificates unsworn are inadmissible. *Keely v. Moore*, 25 S. Ct. 169; 196 U. S. 38, 49 L. Ed. 376.

<sup>1</sup> Cf. *Runyan v. Price*, 15 Ohio St. 1, 86 Am. Dec. 459; *Clapp v. Fullerton*, 34 N. Y. 190; 90 Am. Dec. 681; 87 Me. 578, 33 A. 160; *Williams v. Spencer*, 150 Mass. 346, 15 Am. St. Rep. 206, 23 N. E. 105.

<sup>2</sup> Cf. *Runyan v. Price*, *ib.*; *Fairchild v. Bascomb*, 35 Vt. 398; 12 Mich. 459; *Wilkinson v. Pearson*, 23 Penn. St. 117; 21 Mich. 123, 143.

<sup>3</sup> It is not the opinion of witnesses upon which reliance is placed by the triers of the case; but from the premises which supplied the conviction in the minds of the several witnesses, the court or jury, aided by these opinions, and by the maxims of law, must form its own independent conviction and decide accordingly. *Turner v. Cheesman*, 15 N. J. Eq. 243; *Id.* 266; *Eddey's Appeal*, 109 Penn. St. 406.

<sup>4</sup> *Brown v. Riffin*, 94 Ill. 560. True is it that those whose facilities for observation and judgment were the greatest furnish naturally the most valuable assistance; and hence where medical men disagree in their conclusions, the opinion of the attending physician should carry the most weight. *Harrison v. Rowan*, 3 Wash. C. C. 587; *Cheatham v. Hatcher*, 30 Gratt. 56; *Kempsey v. McGinniss*, 21 Mich. 123. And among laymen no witnesses are so highly favored as the subscribing witnesses; for these were present at the very act, were trusted by the testator to speak for him, and assumed a responsibility in the premises which no one is supposed to esteem too lightly. *Harrison v. Rowan*, *ib.* But these considerations, even though existing in full force, may be offset by others, such as bias, the degree of intelligence and skill, character for truth and veracity, strength of memory, soundness of judgment; and all testimony offered in the case, whether for or against the will, should be weighed in the balance

210. **A few words may be added as to expert testimony** in causes where a testator's mental capacity is at issue, concerning books of medical science or other professional works relating to insanity. The usual rule is that, while such books, if not objected to, may be read in court, either as part of the testimony or in the course of argument, they are liable to mislead, and cannot, upon objection, be read either to court or jury.<sup>1</sup> But in some States the court has discretion to admit or exclude such testimony;<sup>2</sup> and local legislation explicit on this point may be found.<sup>3</sup>

211. **The general competency of a person to testify as an expert** is for the judge presiding at the trial to determine.<sup>4</sup> No jury should give more weight to expert opinions than, in deciding the case on the whole testimony, they think such opinions fairly merit.<sup>5</sup>

212. **As to the manner in which questions should be put to an expert**, there is considerable discussion; but no positive formula can be said to apply exclusively to such testimony. The great practical difficulty is to avoid apparent conclusions of fact where the evidence in the case is complicated or conflicting; while the

and carefully compared. Among cases which discuss or compare the testimony offered upon the issue of a testator's sanity may be mentioned: *Billings's Appeal*, 49 Conn. 456; *Beaubien v. Cicotte*, 12 Mich. 459; *Turner v. Cheesman*, 15 N. J. Eq. 243 (laying down six rules by way of a summary); *Draper's Estate*, 64 A. 520, 215 Penn. 314.

<sup>1</sup> *M'Naghten's Case*, 10 Cl. & F. 200; 1 Redf. Wills, 146; 8 Gray, 430; *Commonwealth v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401; 3 Bosw. (N. Y.) 7; 38 Md. 15; *Fowler v. Lewis*, 25 Tex. 380; 2 Ind. 617.

<sup>2</sup> *Standenmeier v. Williamson*, 29 Ala. 558; 1 Chand. 264; *Melvin v. Easley*, 1 Jones Law, 386.

<sup>3</sup> See *Brodhead v. Wiltse*, 35 Iowa, 429. There seems no reason, at all events, why a medical expert may not show that his opinion in the case is founded partly upon books; for this holds true of all professional knowledge. 5 C. & P. 74; 12 Rich. 321; 1 Redf. Wills, 146. Whether, however, particular books on a given subject are standard ones and trustworthy, or the contrary, is a vital question, not always easy to determine. Reference to other cases rather than other opinions seems less objectionable; for, to quote Chief-Justice Tindal (5 C. & P. 74) "physic depends more on practice than law"; and the facts which go to establish insanity lie within the range partly of common observation and partly of medical or special experience. See *Smith v. Tibbitt*, L. R. 1 P. & D. 354, 398; *Richmond's Appeal*, 59 Conn. 26. But the fundamental objection to admitting medical works or reports at a trial appears to consist in the circumstance that courts and the legal profession bring no critical knowledge or experience to bear upon their contents, nor have they opportunity to test the authority of the book by putting the writer upon the stand, but must confide altogether in mere expert opinion, and thus open a boundless field for collateral inquiry.

<sup>4</sup> *Heald v. Thing*, 45 Me. 397; 117 Mass. 122, 19 Am. Rep. 401; *Boardman v. Woodman*, 47 N. H. 120; *Clay v. Clay*, 2 Ired. 78. "The value of such testimony will depend mainly upon the experience, fidelity, and impartiality of the witness who gives it;" its design being to aid the judgment of the triers of a case in regard to the influence and effect of certain facts which lie out of the observation and experience of persons in general. *Shaw, C. J.*, in 7 Met. 500-505, 41 Am. Dec. 458.

<sup>5</sup> *Watson v. Anderson*, 13 Ala. 202; *Meeker v. Meeker*, 74 Iowa, 352, 7 Am. St. Rep. 489.



practical object is to obtain from the witness the instruction he is qualified to impart as clearly and naturally as possible.<sup>1</sup>

213. **There is much conflict in the testimony which comes from experts;** it is often onesided and partisan; and matured and well-balanced minds tend to run into the most incomprehensible theorizing and unfounded dogmatism, from the exclusive devotion of study to one subject, and that of a mysterious and occult character.<sup>2</sup>

213a. **After probate of the will has been duly granted,** testamentary capacity is to be presumed, should a later contest arise.<sup>3</sup> In other words, all original appeal, if any, having been disposed of, the record of probate of a will affords *prima facie* proof of its due attestation, execution and validity, and the burden to establish the contrary rests upon future contestants.<sup>4</sup>

<sup>1</sup> Various forms of questions which have been put forward, not as an exclusive formula, but rather by way of example should be considered accordingly. "The object of all questions to experts," it is well said, "should be to obtain their opinion as to the matter of skill or science which is in controversy, and at the same time to exclude their opinions as to the effect of the evidence in establishing controverted facts. Questions adapted to this end may be in a great variety of forms. If they require the witness to draw a conclusion of fact, they should be excluded. But where the facts stated are not complicated, and the evidence is not contradictory, and the terms of the question require the witness to assume that the facts stated are true, he is not required to draw a conclusion of fact." Chapman, J., in *Hunt v. Lowell Gas Light Co.*, 8 Allen, 169, 172, 85 Am. Dec. 697. See as to one form of putting the question hypothetically, well adapted to cases where the facts are complicated or conflicting. 7 Gray, 467. Latitude is allowed where the evidence leaves the facts clear. 8 Allen, 169; *M'Naghten's Case*, 10 Cl. & F. 200; 7 Met. 500, 41 Am. Dec. 458; 1 Curt. C. C. 1.

<sup>2</sup> 1 Redf. Wills, 154, referring generally to cases, civil or criminal, which involve some issue of sanity, where hypothetical testimony is sought upon facts observed by others. So far as testamentary causes are concerned, where the validity of some will offered for probate turns essentially upon the point of a decedent's mental capacity, and leaving out of consideration those whose present insanity may still be submitted to the crucial test of personal inspection, very little reliance, certainly, should be placed in the mere theorizing of experts, as compared with the practical knowledge treasured up by those, professional or unprofessional, who have been familiar with the words, idiosyncrasies, and individual traits of one whose mind must be weighed from memory; not only for the reason that psychology is a mysterious and occult science, while the minds of different human beings stamp an impression as distinct though not as distinguishable as their faces, but because from the very nature of the case, it has become impossible to reproduce distinctly at the trial, before expert or jury, all the facts, the symptoms, the phenomena, upon which expert testimony may be safely based where personal acquaintance was wholly wanting. Particularly must this hold true in those numerous instances where the instrument was drawn up and signed at the last stage of life and in the sick-chamber, where the soul wrestled with the body, and the vital currents, mental and physical, turned at feeble and fitful intervals. At such a crisis of life, symptoms and surroundings may have a direct bearing upon the validity of the transaction, far beyond any theoretical consideration whether the testator had or had not the modicum of reason sufficient for the act.

<sup>3</sup> *Baptist Convention v. Ladd*, 59 Vt. 5; *Blough v. Parry*, 144 Ind. 463, 40 N. E. 70, 43 N. E. 560; *Dole's Estate*, 81 P. 534, 147 Cal. 188; 81 N. E. 482, 169 Ind. 154.

<sup>4</sup> 101 N. Y. S. 313 (code). And see "Executors", *post*, Part II, c. 2. Costs in contesting a will on the ground of incapacity in the testator have been charged upon the

## CHAPTER X.

## ERROR, FRAUD, AND UNDUE INFLUENCE.

214. There remain final topics under our general head, to which attention should now be directed; not referable, perhaps, with logical exactness, to testamentary capacity, and yet closely associated with that subject, more especially in cases whose evidence shows that the alleged testator was of weak or doubtful mental capacity.<sup>1</sup> Let us then consider these final topics under our present head: Error, Fraud, and Undue Influence.

215. Of fundamental error in a will, disconnected with fraud practised by others, it is difficult to conceive; and still more so of a fundamental error, due to the testator's carelessness and fault alone. But such a case is supposable.<sup>2</sup> And again, the testator may merely have pretended a will, by way of jest or for some

estate, where, notwithstanding upon full proof the will should stand, there were strong justifying circumstances for raising the controversy. *Frost v. Wheeler*, 43 N. J. Eq. 573, 12 A. 612. Yet the costs of a successful action impeaching the validity of a will, are not to be considered testamentary expense, in the full sense, though ordered to be paid out of the testator's estate. *Prince, Re* (1898), 2 Ch. 225. See 44 Ohio St. 59, as to directing a jury in their verdict.

As to effect of codicil in establishing mental capacity by republication, see *Journeoy's Will*, 57 N. E. 1113, 162 N. Y. 611; *post*, Part IV, c. 3.

<sup>1</sup> Wherever, indeed, the issue *devisavit vel non* is presented for adjudication, other elements though not necessarily put in controversy, are involved in the ultimate decision, besides that of mental soundness, or sufficiency of intellect. Namely, was this identical instrument in its integrity one upon which that intellect operated with a testamentary purpose, or was it not? and again, did or did not that intellect produce the will in question freely and without fraud or undue external pressure? For if the instrument was not what the alleged testator intended to execute as his will, it should be refused probate; and so, too, if his intellect, though not actually unsound, was used by artifice or force to make the will as some one else had contrived it for him.

<sup>2</sup> As where, for instance, two instruments, similar in general appearance, were drawn up, the one a deed or private memorandum, and the other a will, and the testator hastily executed the wrong one; or where two wills were drafted for different persons, and one party signed that which was intended for the other. Here would be a palpable error; and if the testator, being illiterate, blind, or very feeble, had depended upon some scrivener, attorney or attendant in the transaction, the latter would be greatly to blame in the business. We may assume that a palpable and fundamental error like this would defeat the probate. Of course, there might be an instrument presented for probate which was simply a forgery and not a genuine testament at all. See *Hunt's Goods*, L. R. 3 P. & D. 250 (two maiden sisters, with wills of a corresponding character, where one executed the will intended for the other); *Kennedy v. Upshaw*, 64 Tex. 411.

Where a will is executed in duplicate for the testator's convenience, that fact may be shown, and probate will not be so permitted as to give legatees a double advantage. *Hubbard v. Alexander*, L. R. 8 Ch. D. 738. And see 4 S. & T. 44.

collateral purpose of his own.<sup>1</sup> Partial errors occur more naturally; and here the mistake, if an honest one, would consist usually in some misunderstanding between the testator and his scrivener or attorney, whereby the will as drawn up and executed contained one or more words, clauses, or sentences, which changed essentially certain provisions of the will from what the testator is shown to have intended. Errors of this kind, as where a legatee's name is stated incorrectly, are sometimes so patent from the context as to be easily rectified; but the mistake might be a graver and less obvious one, as where a legacy intended for five thousand dollars was written out as for five hundred; and various essential errors of one description or another might be supposed to result from the scrivener's misapprehension of his instructions.<sup>2</sup> Our law does not favor avoiding a solemn will, upon any suggestion of mere mistake or misinformation regarding any expectant beneficiary of his bounty, especially when the testator's opinion was not apparently a perverse one,<sup>3</sup> nor because of trivial and irrelevant mistakes by the testator.<sup>4</sup>

216. **Much difficulty is found as to correcting errors in the probate**, where the error was not fundamental (as if the wrong instrument should be executed), but embraces simply some mistake or omission of words or sentences in the instrument as actually executed and witnessed. At the root of this difficulty appears the objection that a written instrument should not be varied or controlled by parol evidence. English courts of ecclesiastical or probate jurisdiction have not in former times limited their functions very closely in such respect; for here the circumstances surround-

<sup>1</sup> In *Fleming v. Morrison*, 72 N. E. 499, 187 Mass. 120, 105 Am. St. Rep. 386, a "fake" will, not intended as *bona fide* testamentary by the party executing it, but as a blind to deceive another person, was refused probate. See 216 *post*.

<sup>2</sup> All such essential errors, should they be claimed to exist, require, at all events, to be proved; and upon this point the counsel's or scrivener's testimony, and the production of his written notes or instructions may, if admissible, be decisive of the real facts. Here, once more, it is conceivable that the testator himself was the sole party in error; and a comparison of the will with his own draft or his declarations, if admissible, might establish that a slip of the pen, and not his change of purpose at the last moment, produced a will essentially different on its face, in one or more respects, from what he really or perhaps manifestly intended. A partial or corrected probate of the will, as justice and equity may require, is an ideal remedy for this state of things; and words or clauses unintentionally omitted might thus be supplied, or those intentionally inserted might be stricken out, in order that the will should stand of record as the testator actually intended.

<sup>3</sup> 116 Cal. 304, 637; *Jones v. Grogan*, 98 Ga. 552. As to insane delusion, cf. 146, 162.

<sup>4</sup> *Jones's Will*, 85 N. Y. S. 294 (exaggerated ideas of the amount of one's property); *Alexander's Estate*, 55 A. 797, 206 Penn. 47; 31 So. 64, 106 La. 442 (testator's surname wrongly spelled); 207 Mo. 177, 105 S. W. 289.

ing the testamentary act are investigated, in order that the probate tribunal may gather the intentions of the deceased as to what writing or writings shall operate as and compose his will: and, so far as oral or nuncupative wills are permitted, this investigation would naturally take a wide range. But confining ourselves to wills executed in writing, the earlier English rule has been that parol evidence of the testator's intention is receivable, to explain, not an ambiguity upon the construction, but an ambiguity upon the *factum*; that is to say, as to what writing or writings were actually executed with the testamentary intent.<sup>1</sup>

217. But as to wills made since 1838, the English rule debar the probate court from correcting omissions or mistakes in such a disposition, even by reference to the testator's draft or instructions.<sup>2</sup> Indeed, Stat. 1 Vict. c. 26 changes materially the old testamentary law as formerly administered by the ecclesiastical courts.<sup>3</sup> English authority has since tended largely against converting the modern court of probate into a tribunal of practical construction, with the peculiar and dangerous duty of shaping a

<sup>1</sup> Thus, parol evidence may show that a document duly executed as a will was never intended as such; as where by mistake each of two persons executed the instrument drawn up for the other. *Hunt's Goods*, L. R. 3 P. & D. 250. Or where a paper, which on the face is testamentary, is shown to have been a mere contrivance to effect some collateral object. *Lister v. Smith*, 3 S. & T. 282. See 72 N. E. 499, 187 Mass. 120, 105 Am. St. Rep. 386. Or where it was only the authenticated memorandum for some future will. 2 Hagg. 74; *Castle v. Torre*, 2 Moore P. C. 133. It may show that a codicil was intended to republish a will of a different date from that absurdly written in it through mistake, and in general may connect the codicils with their appropriate will and with one another, and thus give all the links of the testamentary chain, in case of doubt, their rightful sequence. All this seems reasonable.

But it is also held, prior to 1838, that parol evidence or the comparison of writings may show whether the testator meant a particular clause to be part of the instrument, or whether it was introduced without his knowledge; and whether the residuary clause or any other passage was accidentally omitted. And thus has the court changed the will as actually presented. *Blackwood v. Damer*, 4 Phillim. 458 (an extreme case of probate alteration); *Fawcett v. Jones*, 3 Phillim. 450; 1 Wms. Exrs. 356-358. In *Fawcett v. Jones*, 3 Phillim. 485, former cases are cited, and in this case Sir John Nichol refused to pass a line which, once passed, would have set all wills at the mercy of parol evidence and introduced, as he said, "a most alarming insecurity into the testamentary dispositions of all personal property."

<sup>2</sup> 2 Curt. 852; *Guardhouse v. Blackburn*, L. R. 1 P. & D. 109, in which the general rules are stated which ought, since Stat. 1 Vict. c. 26, to govern questions of this kind in probate tribunals; *Harter v. Harter*, L. R. 3 P. & D. 11.

<sup>3</sup> For under that law, as Lord Penzance has observed, a "testamentary paper needed not to have been signed, provided it was in the testator's writing; and all papers of a testamentary purport, if in his writing, commanded the equal attention of the court save so far as one, from its date or form might be manifestly intended to supersede or revoke another, as a will superseding instructions, or a subsequent will revoking a former." *Guardhouse v. Blackburn*, L. R. 1 P. & D. 109, 113 (as to personalty). Unexecuted instructions, it was here conceded, can no longer constitute the basis of a probate; for no paper, whatever its form, can be admitted which is not executed according to the statute.

will into conformity with the supposed intentions of the testator, whether by supplying or substituting words and clauses, or perhaps expunging.<sup>1</sup>

218. In this country, the later rule of the English probate tribunals appears to prevail rather than the earlier and looser one of the old ecclesiastical courts. For these new probate tribunals are more nearly like ours, while the modern Stat., 1 Vict. c. 26, has its American counterpart in almost every State, where local legislation has long imposed peculiar formalities of execution with attestation, in wills both of real and personal property.<sup>2</sup> Although through some important omission, the whole scope and bearing of the testamentary provisions, as actually intended, may be materially changed, the mistake, it is held, cannot invalidate the will on that account, and render it inoperative;<sup>3</sup> for there is no such doctrine of law as requires the testator's intent to be indivisible, or defeats the will *in toto* inasmuch as the testator's intention must

<sup>1</sup> Harter v. Harter, L. R. 3 P. & D. 11; Davy, Goods of, 1 S. & T. 262. But see 219.

<sup>2</sup> In an American court of probate, parol evidence may doubtless establish that the alleged testator, at the time of signing the instrument, did not understand that it was a will, nor intend the identical writing to operate as such. 1 Mass. 258, 2 Am. Dec. 16; Couch v. Eastham, 27 W. Va. 796, 55 Am. Rep. 346; 72 N. E. 499, 187 Mass. 120, 105 Am. St. Rep. 386. Probably, too, the true sequence and connection of will and codicils might be verbally shown where ambiguity existed; or, perhaps, that sheets inadvertently omitted or tacked on did or did not really belong to that which, properly fastened together, constituted the whole instrument upon which signature and attestation were meant to operate. Nuncupative wills, in the rare instances when they are still permitted, follow their own mode of proof. But the limit of correcting alleged mistakes, or explaining an ambiguity by adding or changing, seems here to be approached. See e.g. Lemann v. Bonsall, 1 Add. 389. And where one, fully capable and free from undue influence or coercion, executes for his last will a certain instrument as already drawn up, his draft or instructions cannot, we may assume, be resorted to for correcting an alleged mistake of omission or expression with the aid of parol testimony; especially if the contents being actually made known to him in detail, he may well be presumed to have adopted them. For any one is liable to change what has been drafted for him before he executes; and to allow an instrument to be changed in terms from that which one has executed with all the solemnities by which the law surrounds it, upon loose and untrustworthy oral evidence, is to involve the transaction in lasting uncertainty. Gifford v. Dyer, 2 R. I. 99, 57 Am. Dec. 708; 8 Conn. 254, 20 Am. Dec. 100; 7 S. & R. 111, 10 Am. Dec. 450; 4 Bradf. Sur. 12; Andress v. Weller, 2 Green Ch. 604. In Barker v. Comins, 110 Mass. 477, the testator read over the will and had it read to him besides. And see Jones v. Habersham, 63 Ga. 146. Even where the will as drawn states the name of a legatee, but through some mistake in copying it, and not because of the testator's neglect to state the sum intended, the amount of the legacy is left blank, this important omission cannot be supplied in the probate. Comstock v. Hadlyme, 8 Conn. 254, 20 Am. Dec. 100.

<sup>3</sup> Comstock v. Hadlyme, 8 Conn. 254, 20 Am. Dec. 100; Salmon v. Stuyvesant, 16 Wend. 321; Hearn v. Ross, 4 Harring. 46; 3 Bradf. 107. A will may be in part good and in part bad, partly sustained and partly rejected. Morris v. Stokes, 21 Ga. 552. The validity of a will is not affected by mistakes in describing the land specifically devised. Campbell v. Campbell, 138 Ill. 612. See Franklin v. Belt, 60 S. E. 146, 130 Ga. 37 (mistake caused by a party profiting by it).

fail in part. In general, no mere misconception of fact or law can invalidate a will.<sup>1</sup>

219. **But it would appear that something superfluous may be expunged** from a will without transgressing the statute which prescribes a formal attestation, although a co-equal right to insert words or reform a sentence on the ground of a mistake be denied.<sup>2</sup> And if words may be thus expunged from the probate, when shown to have been introduced by mistake without the testator's knowledge and assent, so may whole clauses,<sup>3</sup> or some signature which was improperly and needlessly added to the attested instrument.<sup>4</sup>

220. **Courts of equity have general jurisdiction to correct mistakes in a will**, as to their effect, when the mistake is apparent on the face of the instrument or can be made out by a due construction of its terms.<sup>5</sup> But a court of equity does not in such a case change the probate; it corrects the mistake or supplies the omission in its effect. The court moulds, so to speak, the language of the testator, so as to carry into effect what he obviously intended. It is not the province of a court of equity to reform a will which the statute requires to be executed with certain formalities.<sup>6</sup> And

<sup>1</sup> *Monroe v. Barclay*, 17 Ohio St. 302, 93 Am. Dec. 620.

<sup>2</sup> Numerous cases, English and American, establish that probate of a part only of a properly attested instrument purporting to be a will may be decreed while the rest is rejected. 3 Phillim. 434; *Allen v. McPherson*, 1 H. L. C. 209; *Morris v. Stokes*, 21 Ga. 552; *Rhodes v. Rhodes*, 7 App. Cas. 192; 248, *post*. But for a court of probate to try to find out by extrinsic evidence what sort of a legal provision the testator meant to make, and then, by such alterations as shall carry out his intention in different language and with possibly different legal effect from what he intended, remodel the will in form to suit the theory, is certainly a dangerous abuse of discretion. *Supra* 217, 218. Once more, where the interpolated words appear by the proof not to have been really made known to the testator, or adopted into the instrument with his assent, there is the more reason for striking them out at the probate. *Oswald's Goods*, L. R. 3 P. & D. 162; *Morrell v. Morrell*, 7 P. D. 68; *Thomson's Goods*, L. R. 1 P. & D. 8; *Boehm's Goods* (1891), P. 247; *Bushnell's Goods*, 13 P. D. 7 (a word changed, in a plain case). And see (1895) P. 341, where the Christian name of the executor was supplied in probate under an *alias*; (1899) P. 193.

<sup>3</sup> See *Morrell v. Morrell*, 7 P. D. 68, and authorities cited; 2 S. & T. 23; *Moore's Estate*, (1892) P. 378.

<sup>4</sup> *Smith's Goods*, 15 P. D. 2 (1889).

<sup>5</sup> 1 Story Eq. Jur. §§ 169-183; *Mellish v. Mellish*, 4 Ves. 45; 32 Me. 340; *Hunt v. White*, 24 Tex. 643; *Jackson v. Payne*, 2 Met. (Ky.) 567. The rights of parties are thus passed upon, where there are several persons of the same name, or some misnomer or misdescription appears in the will. *Wood v. White*, 32 Me. 340. Independent gifts to strangers may thus be supplied, as well as a series of gifts to children or members of a class. *Mellor v. Daintree*, 33 Ch. D. 198. Blanks, too, are thus supplied by construction, when the testator's intention was apparent. As where, for instance, the word "dollars" was carelessly omitted after the words "fifteen hundred" in stating a legacy. *Snyder v. Warbasse*, 3 Stockt. Ch. 463. Or where the name of an omitted legatee can be inferred from the whole will. 31 Ch. D. 460. And see *post*, 477, 527, 573.

<sup>6</sup> *Fitzpatrick v. Fitzpatrick*, 36 Iowa, 674, 14 Am. Rep. 538; *Schlottman v. Hoffman*, 73 Miss. 188, 55 Am. St. Rep. 527, 18 So. 893. See *Yates v. Cole*, 1 Jones Eq. 110, 59 Am. Dec. 602; *Whitlock v. Wardwell*, 7 Rich. 453.

since the Statute of Frauds, which requires wills to be in writing, parol evidence or evidence *dehors* the will is not admissible to vary or control the terms of the will, as expressed, but only to correct mistakes apparent on the face of the will, or to explain some latent ambiguity.<sup>1</sup>

221. **Where fraud or force appears to have operated**, the general considerations we have stated, as to the effect of essential error in vitiating a will, apply; only that justice is always more alert to defeat gifts and bequests brought about by the wrongful imposition of others, who cherish sinister designs and seek advantage, than those which impute mere error to the giver, or to some third party in the affair who was disinterested.<sup>2</sup> Our common law makes no classification of persons incapable for want of liberty or free will, as did the civilians, but leaves the court to determine, upon all the circumstances of each particular case, whether or no the testator had the essential *liberum animus testandi*.<sup>3</sup>

222. **Closely connected with the subject of fraud and force is that of importunity or undue influence**; which latter term is now commonly used in the law of wills to denote that more subtle and insidious constraint which takes away free agency by means of the ascendancy gained by a stronger mind over the weaker.<sup>4</sup>

<sup>1</sup> *Hunt v. White*, 24 Tex. 643; *Jackson v. Payne*, 2 Met. 567. And see *post*, Part VI, c. 3. Under our American system probate courts exercise equity powers to a considerable extent, while the same appellate tribunal serves for both probate and equity matters; and it seems not only highly expedient, but practicable, that all corrections which properly involve a change on the face of the will should be in some way spread upon the probate records, which serve, in modern times, for public information and to perpetuate the proof of wills.

<sup>2</sup> If, then, an instrument executed under the wrong impression that it was one's own intended will, was really a different document in terms, artfully supplied by another, with some ulterior purpose in view, it cannot stand; and far more readily ought material words and sentences omitted, changed, or interpolated to affect the probate of the will, or vitiate that instrument altogether, whenever fraudulent design, and not a scrivener's innocent mistake, is shown to have produced it. Where suspicion attaches to such a document, no strong presumption arises from its execution; and, although the testator knew and approved the contents of the paper, it may still be refused probate if fraud purposely practised on the testator in obtaining his execution be established in proof. See *Lord Penzance in Guardhouse v. Blackburn*, L. R. 1 P. & D. 109, 116.

So, too, a will which has been extorted from a testator by force is voidable as well after death by those whose rights would be impaired by its provisions as, during his life-time, by the unwilling testator himself. *Eyre, C. B.*, in *Mountain v. Bennet*, 1 Cox, 355 (unless ratified after all constraint was removed).

<sup>3</sup> 2 Bl. Com. 497; Swinb. pt. 2, § 8; 1 Wms. Exrs. 44; *Jackson v. Kniffen*, 2 Johns, 31, 3 Am. Dec. 390.

<sup>4</sup> Undue influence involves in some degree one or both the elements of fraud and force, though not so distinctly or easily made out, and is usually exerted in originating and shaping the will of some old or feeble person, not actually incapable, and yet so nearly disabled by sickness or mental infirmity that the pressure exerted has produced a formal testamentary expression inconsistent with the idea of a free and disposing mind.

223. **Equity relieves against fraud and force, as well as error,** by virtue of its general jurisdiction; but in the present instance an adequate and far more suitable remedy is found by making the issue, like that of mental capacity, at the probate of the will.<sup>1</sup> Under present English and American law, equity still passes upon the probated will as a court of construction, and determines what, in fact, the instrument as thus spread upon the record shall be taken to mean, as to provisions in controversy; but such questions may now be raised in the probate court, while the estate is in course of settlement, or by virtue of equity powers conferred in these later days by express legislation; and in all such cases, the exercise of a probate and equity supervision by the same appellate court as modern legislation provides, tends to secure that consistency and harmony of interpretation and enforcement which justice and good sense imperatively demand.<sup>2</sup>

<sup>1</sup> In some of the earlier cases the English court of chancery distinctly asserted a jurisdiction to relieve against fraud in procuring a will; in other cases disclaiming such jurisdiction; and in still others declaring the party to the fraud a trustee for those prejudiced by it. 1 Wms. Exrs. 45, note, citing 1 Ch. Rep. 22, 123, 236; 1 P. Wms. 287; 2 Vern. 8. But it became finally settled in England long ago that equity could not set aside a will of either real or personal property, because a court of law was competent to annul for fraud in the one case, and an ecclesiastical court in the latter. *Allen v. M'Pherson*, 1 H. L. Cas. 191; *Meluish v. Milton*, 3 Ch. D. 27; Wms. Exrs. 45. Modern legislation in that country makes chancery and probate divisions of the same high court of justice, and removes the former distinctions between wills of realty and personalty as to the effect and desirableness of a probate. Objections, therefore, on the ground of fraud and force, should now be taken in the court of probate, and the chancery judges decline still more positively to interfere with the exclusive exercise of a probate jurisdiction. Act 20 and 21 Vict. c. 77 (1857); *Pinney v. Hunt*, 6 Ch. D. 98; *Barracrough v. Greenhough*, L. R. 2 Q. B. 612; *Meluish v. Milton*, 3 Ch. D. 27.

In this country the probate courts of each State are invested with special powers to deal with issues of fraud and force, and to re-open, if necessary, their own decrees, or submit to those of the appellate court, which regulates all matters of chancery or probate. The American rule, therefore, has steadily discountenanced the idea that equity courts should entertain bills for setting aside a will on the ground of fraud, force, or even mistake, inasmuch as the probate registry preserves the public evidence of testamentary succession, and probate courts themselves have all the powers and machinery necessary to give full and adequate relief. See *Gaines v. Chew*, 2 How. 619; *Broderick's Will*, 21 Wall. 503; *Townsend v. Townsend*, 4 Coldw. 70; 1 Mo. 410; *Blue v. Patterson*, 1 Dev. & B. Eq. 457. In most States probate is conclusive and necessary in wills, whether of real or personal property or of both combined. And probate of a will determines all questions of fraud, force, and undue influence in their procurement, as well as of testamentary capacity. *Clark v. Fisher*, 1 Paige, 176. See 21 Wall. 503, 509, 22 L. Ed. 599, *per* Mr Justice Bradley; *Morrison v. Thoman*, 89 S. W. 409, 99 Tex. 409 (husband's fraud upon his wife, where both executed wills together); *Arnold's Estate*, 82 P. 252, 147 Cal. 583.

<sup>2</sup> See *Gawler v. Standerwick*, 2 Cox, 16; 1 Wms. Exrs. 45; *N. E. Trust Co. v. Eaton*, 140 Mass. 532, 54 Am. Rep. 493. Fraud justifying the refusal of probate may be inferred from circumstances tending to show it. *Dodson v. Dodson*, 105 N. W. 1110, 142 Mich. 586; *King v. Gilson*, 90 S. W. 367, 191 Mo. 307; 62 A. 108, 213 Penn. 9 (insufficient proof); 62 A. 610, 78 Conn. 429.

The legal construction of a will is not cognizable by the appellate court when sitting to determine the question of its probate. *Small v. Small*, 4 Greenl. 220.



224. **Fraud, no less than open force, vitiates a will.** If, therefore, the testator be circumvented by fraud or deceit, the testament is of no more force than though he were constrained by fear.<sup>1</sup> There is no positive rule to be laid down as to the *quantum* or quality of deceit required to vitiate a will; but the court or triers should judge by all the circumstances, whether it is probable that the deceit took effect upon the testament, considering the character of the latter, and comparing the deceit with the capacity or understanding of the person supposed to be deceived.<sup>2</sup>

225. **Fraud and imposition, or undue influence, vitiate a will,** whenever practised upon a weaker mind to the extent of overpowering and directing it, provided the result be such that others have a right to complain. Such weakness of mind need not, of course, amount to actual incapacity for making any will;<sup>3</sup> though if actually incapable, still less can one's will be established.<sup>4</sup>

226. **Bodily and mental condition of testator at the time of execution** is, therefore, of great consequence in such an issue. What, for example, would be improper influence in a person of

<sup>1</sup> Swinb. pt. 7, § 3; 1 Wms. Exrs. 45.

<sup>2</sup> Swinb. pt. 7, § 3. Thus, it is held that when a legacy is given to a person, under a particular character which he has falsely assumed, and which alone can be supposed the motive of the bounty, the law will not permit him to avail himself of it, and therefore he cannot demand his legacy. *Rishton v. Cobb*, 5 My. & Cr. 150. But before applying such a rule, the court must be satisfied that his assumed character was the motive of the bounty. *Kennell v. Abbott*, 4 Ves. 802; *Wilkinson v. Joughin*, L. R. 2 Eq. 319. Whether such a rule would operate to deprive one of testamentary benefits with whom a testator lived as his wife, on the allegation that she had deceived him, having a former husband still living, must depend upon circumstances; and certainly the character of lawful wife is by no means the sole moving cause of a man's gift to one who has proved his faithful and devoted companion. *Meluish v. Milton*, 3 Ch. D. 27. 29.

<sup>3</sup> *Lord Donegal's Case*, 2 Ves. Sen. 408.

<sup>4</sup> The question, it is said, whether a will is the free and voluntary act of the testator, or the result of fraud or of influences unduly operating upon him in consequence of which his will was made subordinate to that of another, depends upon the question, whether he had sufficient intelligence to detect the fraud, or strength of will to resist the influences brought to bear upon him. *Griffith v. Diffenderffer*, 50 Md. 466; *Shailer v. Bumstead*, 99 Mass. 121; *Compher v. Browning*, 76 N. E. 678, 219 Ill. 429, 109 Am. St. Rep. 346; *Dausman v. Rankin*, 88 S. W. 696, 189 Mo. 677, 107 Am. St. Rep. 391; *Perkins v. Perkins*, 90 N. W. 55, 116 Iowa, 253; 31 Utah, 415, 88 P. 338; 80 N. E. 215, 194 Mass. 157. There can be no fatally undue influence, unless there is a person incapable of protecting himself, as well as a wrong doer to be resisted. *Latham v. Udell*, 38 Mich. 238; 99 Mass. 121. The two grounds of opposition—(1) that the testator was not of sound and disposing mind; and (2) that the will was procured by fraud, compulsion, or undue influence,—are often so closely connected as to be properly made together at the probate, the issue being determined by the proof adduced at the trial, although the burden of proof rests differently in the two issues. See 239, *post*. The issues of mental unsoundness and undue influence may be embraced in one inquiry of *devisavit vel non* where both questions are connected together. *Wilson's Appeal*, 99 Penn. St. 545.

feeble health, might not be such in the case of one in robust health;<sup>1</sup> and what would not amount to moral coercion while the testator was in his prime, might prove such when he approached his second childhood.<sup>2</sup>

227. **Undue influence is defined as that which compels the testator to do what is against his own wishes or will, from fear, the desire of peace, or some feeling which he is unable to resist.**<sup>3</sup> We say that the influence must be undue, in order to vitiate the instrument, because influences of one kind or another surround every rational being, and operate necessarily in determining his course of conduct under every relation of life. Within due and reasonable limits such influence affords no ground of legal objection to his acts.<sup>4</sup> Not even can the circumstance that the influence gained by one individual over another was very great be treated as undue in our present connection; especially if the person influenced had free opportunity and strength of mind sufficient to select what influences should guide him, and was in the full sense legally and morally a responsible being.<sup>5</sup> The undue influence which vitiates

<sup>1</sup> *Griffith v. Diffenderffer*, 50 Md. 466; *Haydock v. Haydock*, 33 N. J. Eq. 494.

<sup>2</sup> In fact, controversies of this kind occur most commonly where the decedent was at the time of executing the instrument in declining health of mind and body, and so detached from his usual surroundings as to be peculiarly exposed to the secret machinations and importunities of some person or persons who, purposely or through favoring opportunity, hedged him about as life and reason ebbed away. And numerous cases might be cited to illustrate how readily a will may be set aside, without much regard to theoretical distinctions of *compos* or *non compos*, wherever it appears that for procuring it a person of at least weak capacity, and nearly, if not altogether out of his mind, was coerced or imposed upon. *Perret v. Perret*, 184 Penn. St. 131, 39 A. 33; 3 Redf. 181; 33 N. J. Eq. 494; *Chappell v. Trent*, 90 Va. 849, 19 S. E. 314. On the other hand, some have thought that the exercise of undue influence necessarily presupposes weakness of mind in the testator; and, certainly, it matters little how ingenious is the fraud, or how coercive the influence, if there be intelligence enough to detect, and strength enough to resist them. *Ante*, 225.

<sup>3</sup> *Turner v. Cheesman*, 15 N. J. Eq. 243; *Gardiner v. Gardiner*, 34 N. Y. 155; 1 Redf. 249; *Blakey v. Blakey*, 33 Ala. 611; 19 Ala. 80; 38 Ala. 131; *Potts v. House*, 6 Ga. 234; 5 Gill & J. 269, 25 Am. Dec. 282; 9 Md. 540; *Wittman v. Goodhand*, 26 Md. 95; 1 Rich. 80, 42 Am. Dec. 404; *Marshall v. Flinn*, 4 Jones L. 199.

<sup>4</sup> Hence mere passion and prejudice, the influence of peculiar religious or secular training, of personal associations, of opinions, right or wrong, imbibed in the natural course of one's experience and contact with society, cannot be set up as undue to defeat a will, if, indeed, it were possible to gauge the depth of such influences at all. *Newton v. Carberry*, 5 Cranch C. C. 632. See *Lord Cranworth in Boyse v. Rossborough*, 6 H. L. Cas. 6; 3 DeG. M. & G. 817; *Wingrove v. Wingrove*, 11 P. D. 83. It is a species of constructive fraud not to be defined by any fixed words. *Smith v. Henline*, 174 Ill. 184, 51 N. E. 227; 69 Ala. 555, 44 Am. Rep. 528.

<sup>5</sup> "In a popular sense," says Lord Cranworth, "we often speak of a person exercising undue influence over another, when the influence certainly is not of a nature which would invalidate a will. A young man is often led into dissipation by following the example of a companion of riper years, to whom he looks up, and who leads him to consider habits of dissipation as venial, and perhaps even creditable; the companion is then said to exercise an undue influence." *Boyse v. Rossborough*, *supra*. And see *Parfitt v. Lawless*, L. R. 2 P. & D. 462 (Lord Penzance).

a testament has always something sinister, corrupt, and selfish about it, when properly viewed, however sly and secret in its workings, or varnished over with hypocrisy, and hence is difficult to be traced except in the effect it has produced; coercion or fraud is an element almost invariably present.

228. **Undue influence may be exerted by physical coercion**, by importunity, or by threats of personal harm and duress. But a more common kind of undue influence than this is where the mind and the will of the testator have been artfully overpowered and subjected to the will of another, so that while the testator appeared to execute willingly and intelligently, it was really the will of another, induced by the paramount influence thereby exercised upon a weak or impaired mind.<sup>1</sup> Whatever, indeed, destroys free agency and constrains a person to do what is against his will, and what he would not do if left to himself, is undue influence in testamentary law, whether the control were exercised by physical force, threats, importunity, or any other species of mental or physical coercion.<sup>2</sup>

To suppose, however, instead of this evil influence, selfishly exerted to the exclusion of others who, rightly considered, were equal or greater objects of the testator's bounty, an ascendancy gained and exerted to reclaim from dissipated habits and for some just and benevolent purpose, this is never likely to invalidate a will, however earnest or powerful. By this we do not intend that justifiable ends are to be sought by unjustifiable means. But should an intimate friend, a spiritual adviser, or some member of the testator's household to whom he is strongly attached, earnestly dissuade him from an unjust purpose, urge him not to disinherit those entitled to his bounty, against whom, without good cause, his heart has been locked up, plead and urge him to become reconciled, to forgive, to part from life in charity and peace,—in short, to make what all ought to call a fair and natural will; and this in an unselfish spirit and without seeking some underhand personal advantage, such influence should not be allowed to disturb the will, on any mere suggestion that it was potent in preventing the wrong. See *Harrison's Will*, 1 B. Mon. 351. Nor are considerations addressed to a testator's good feeling, from disinterested and honorable motives, and simply influencing his better judgment, to be deemed "undue." *Tucker v. Field*, 5 Redf. 139. And see 2 Demarest, 354; *Eatis v. Montgomery*, 93 Ala. 293, 9 So. 311; *Waters v. Waters*, 78 N. E. 1, 222 Ill. 26, 113 Am. St. Rep. 359; *Turner's Appeal*, 44 A. 310, 72 Conn. 305.

<sup>1</sup> Such a will may be procured by working upon the fears or the hopes of a weak-minded person; by artful and cunning contrivances; by constant pressure, persuasion, and effort, so that the mind of the testator is not left free to act intelligently and understandingly. *Earl, J.*, in *Marx v. McGlynn*, 88 N. Y. 357, 370. And we may well assume that a pressure of whatever character, whether it acts on the fears or on the hopes of an individual, is, if so exerted as really to overpower the volition, a species of restraint under which no valid will can be made. *Hall v. Hall*, L. R. 1 P. & D. 481; *Haydock v. Haydock*, 33 N. J. Eq. 494.

<sup>2</sup> *Haydock v. Haydock*, *supra*; *Layman v. Conrey*, 60 Md. 286; *Mueller v. Pew*, 106 N. W. 840, 127 Wis. 228; 106 N. W. 1129, 143 Mich. 476; 91 N. Y. S. 1097; *Johnson v. Farrell*, 74 N. E. 760, 215 Ill. 542; *Turner's Appeal*, 44 A. 310, 72 Conn. 305. Undue influence sufficient to invalidate a will may be exerted without positive fraud, notwithstanding the elements of fraud and coercion which may mingle together where undue influence is actually exercised. Nor is undue influence dependent on fixed principles or measured by degree or extent; but by its effect in the particular case, and by a

229. To invalidate, therefore, a will on the ground of fraud, compulsion, or undue influence, such conduct must be of such a character as to destroy the testator's free agency, and substitute for his own another person's will.<sup>1</sup> The undue influence thus exerted amounts at least to a moral coercion, and constrains the testator, through fear, the desire of peace, or some other motive than affection or a sense of duty, to do that which was really against his will.<sup>2</sup> On the other hand, mere honest argument or persuasion, earnest solicitation, and such influence as one person may deservedly obtain over another by kind offices and affection, are as a rule insufficient to affect the validity of a will, in the absence of decisive fraud, even though one should by such means procure a disposition in favor of himself or of some one else whose interest he has maintained.<sup>3</sup> But while any person has the right to fairly persuade a

comparison of the two minds which antagonize. If found sufficient to destroy the testator's free agency in the transaction at issue, it must be pronounced undue even though slight; and conversely, where the testator has resisted the pressure successfully, and acted for himself, there is no undue influence which in any positive sense impairs his will.

<sup>1</sup> *Mountain v. Bennett*, 1 Cox, 355; *Marx v. McGlynn*, 88 N. Y. 357; 43 Penn. St. 46; 45 Ill. 485; *Morris v. Stokes*, 21 Ga. 552; 5 Harring. 469, 60 Am. Dec. 650; *Duffield v. Morris*, 2 Harring. 375; *McDaniel v. Crosby*, 19 Ark. 533; 26 Md. 95; *Layman v. Conrey*, 60 Md. 286; 33 Ala. 611; 15 N. J. Eq. 243; 120 Mo. 252, 25 S. W. 506; *Bulger v. Ross*, 98 Ala. 267, 12 So. 803; *Schmidt v. Schmidt*, 47 Minn. 451, 50 N. W. 598; *O'Brien's Appeal*, 60 A. 880, 100 Me. 156; *Bohler v. Hicks*, 48 S. E. 306, 120 Ga. 800; *Stewart v. Lyons*, 47 S. E. 442, 54 W. Va. 665; *Crowson v. Crowson*, 72 S. W. 1065, 172 Mo. 691; *Keegan's Estate*, 72 P. 828, 139 Cal. 123; *Stull v. Stull*, 96 N. W. 196, 1 Neb. (unoff.) 380. Thus importunity, in its legal acceptation, here imports such a degree of urgent and incessant soliciting that, under all the circumstances, and considering the testator's condition of mind and body at the time, it should be concluded that he was too weak to resist it, and his disposition could not be deemed the free act of a capable testator. See *Kinleside v. Harrison*, 2 Phillim. 551, 552; 1 Moore P. C. 478; 1 Paige, 171; 5 Gill & J. 269, 25 Am. Dec. 282; *Baldwin v. Parker*, 99 Mass. 84, 96 Am. Dec. 697; 63 N. Y. 504; 77 N. Y. 394, 33 Am. Rep. 626; *Tawney v. Long*, 76 Penn. St. 106; 57 Conn. 127; *Thompson v. Ish*, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552; 135 Ind. 440, 35 N. E. 279.

<sup>2</sup> 1 Hagg. 581; *Hall v. Hall*, 38 Ala. 131; 76 Penn. St. 106; 225 *supra*.

<sup>3</sup> 34 N. Y. 197, 90 Am. Dec. 681; *Sutton v. Sutton*, 5 Harring. 459; 41 Penn. St. 312, 80 Am. Dec. 620; *Roe v. Taylor*, 45 Ill. 485; 99 Mass. 88; *Shailer v. Bumstead*, 99 Mass. 112; 19 Ark. 533; 18 Hun, 403; *Hughes v. Murtha*, 32 N. J. Eq. 288; *Yoe v. McCord*, 74 Ill. 33; *Schofield v. Walker*, 58 Mich. 96, 24 N. W. 624; *Trost v. Dingler*, 118 Penn. St. 259, 4 Am. St. Rep. 593, 12 A. 296; *Robinson v. Stuart*, 73 Tex. 267, 11 S. W. 275; *Wilcoxon v. Wilcoxon*, 165 Ill. 454, 46 N. E. 369; 13 Ark. 474; *Kerr v. Lunsford*, 31 W. Va. 659, 2 L. R. A. 668; 49 Ark. 367, 5 S. W. 590; *Pensyl's Will*, 157 Penn. St. 465, 27 A. 669. The influence of affection and attachment, such as induces the desire to gratify, is not undue in any legal sense. *Williams v. Goude*, 1 Hagg. 581; 1 Wms. Exrs. 47. To rule to a jury that undue influence is "improper influence" does not express the legal idea. 98 Mo. 433, 11 S. W. 974. Nor do fair and flattering speeches, though abundantly proved, vitiate the will, unless coupled with fraud. 1 Wms. Exrs. 47; 4 Greenl. 220, 16 Am. Dec. 253. Nor even the fact that the arguments or persuasions of the person seeking a chief benefit by the will were indelicate, indecorous, or improper. 17 Barb. 236; *Tawney v. Long*, 76 Penn. St. 106. Nor that such a party passively encouraged the testator's angry resentment towards

testator to make him his executor or a beneficiary under his will, an unfavorable impression is afforded where the testator is shown to be of weak judgment, the opportunity for undue influence considerable, and the benefit to the persuading party under the will far greater than a testator would naturally bestow.<sup>1</sup>

230. **Lawful influence such as grows out of legitimate or social relations**, or professional or spiritual intimacy, must be allowed to produce its natural fruits even in wills. The presumption favors a lawful, rather than unlawful, exercise of influence under such circumstances; and the exertion of a natural influence upon the testator can never afford adequate ground of itself for setting a testament aside.<sup>2</sup> But fraud or artful contrivance by which others who are innocent suffer wrong may afford good reason for setting aside the will, in such cases, even though no coercive influence should appear.<sup>3</sup> In short, the will should be the *bona fide* will of the testator, however induced; from a fraudulent inducement no one should ever, if possible, be suffered to profit to the injury of the innocent; and a will, the offspring of deception, cannot stand against the injured any more than one the offspring of constraint.<sup>4</sup>

231. **Secrecy in the execution of the will**, if clearly attributable to the mind and wishes of the testator, is no badge of fraud.<sup>5</sup> But

others cut off eventually in his favor. *Woodward v. James*, 3 Strobb. 44. Nor simply that the person exerting an influence had illicit sexual intercourse with the testator or testatrix. 1 Rich. 80; *Roe v. Taylor*, 45 Ill. 485; *Wainwright's Appeal*, 89 Penn. St. 220; *Sunderland v. Hood*, 84 Mo. 293; 82 Ky. 93, 56 Am. Rep. 880; 52 N. J. Eq. 801; *Johnson's Estate*, 159 Penn. St. 630; *Middleton's Will*, 64 A. 1134, 68 N. J. Eq. 798; 85 N. Y. S. 294. But unlawful cohabitation may be evidence of undue influence in connection with other facts. *Wainwright's Appeal*, *supra*; *Main v. Ryder*, 84 Penn. St. 217, 28 A. 448; *McClure v. McClure*, 86 Tenn. 173, 6 S. W. 44; *Smith v. Henline*, 174 Ill. 184, 51 N. E. 227; 22 *ante*. One who voluntarily joins a religious order whose by-laws require a vow that all one's property shall be bestowed upon it may make such a will without having coercion imputed. 67 Minn. 335, 69 N. W. 1090. In all such instances we are to suppose that the testator's free agency is not overcome.

<sup>1</sup> *Walker v. Hunter*, 17 Ga. 364.

<sup>2</sup> *Small v. Small*, 4 Me. 220, 16 Am. Dec. 253; *Sechrest v. Edwards*, 4 Met. (Ky) 163; *Lowe v. Williamson*, 2 N. J. Eq. 82; *Donovan's Estate*, 73 P. 1081, 140 Cal. 390; 1 Bradf. 458; 2 J. J. Marsh, 340; 4 Jones Eq. 142; *Norton v. Paxton*, 110 Mo. 456, 19 S. W. 807.

<sup>3</sup> As, for instance, where one relative has produced the disinheritance of another by false representations, and abused peculiar opportunities of access to color as he likes the sick man's disposition. 5 S. & R. 207; 6 S. & R. 55; *Nussear v. Arnold*, 13 S. & R. 323. Or where one dictates in fact the will, the testator being at the time unable to speak, and falsely pretends to interpret the dying person's wishes according to his own. *Scribner v. Crane*, 2 Paige, 147, 21 Am. Dec. 81. And see *Lowe v. Williamson*, 1 Green Ch. 82; *Blanchard v. Nestle*, 3 Denio, 37. Or where by false representations as to the contents of an existing will one has induced the testator to make a new one. *Moore v. Blauvelt*, 15 N. J. Eq. 67.

<sup>4</sup> *Florey v. Florey*, 24 Ala. 241.

<sup>5</sup> *Coffin v. Coffin*, 23 N. Y. 9, 80 Am. Dec. 235; *ante* 245; 43 N. J. Eq. 167.

this and all the circumstances in fact which we have pronounced insufficient of themselves, may from their association with other facts and circumstances of the case become of pregnant consequence upon the issue.<sup>1</sup> Less undue influence and less fraud are required to procure a will unlawfully from a person of weak and impaired intellect and physical feebleness, than from a person in full mental and bodily vigor.<sup>2</sup>

231a. **Bounty may be distinguished from legal duty in all such cases.**<sup>3</sup>

232. **A present restraint, fraud, or undue influence, operating upon the testator's mind in the very act of making the will, and affecting its execution or the particular dispositions it makes is here regarded.**<sup>4</sup> In short, undue influence, fraud or constraint cannot of itself defeat a will offered for probate, unless the evidence proves, not only that it was in fact exercised, but also that its exercise was effectual in producing the particular will offered.<sup>5</sup>

<sup>1</sup> 53 A. 253, 203 Penn. 400. Thus flattering speeches may, if deceitfully employed to direct a mind that has lost its self-direction, render void the will upon which they have operated. See Buchanan, C. J., in *Davis v. Calvert*, 5 Gill & J. 301. Some of the cases have held that such an influence, to produce so disastrous a result, must have been consciously exercised with a view to the result. 1 Wms. Exrs. 47, Perkins's note; 4 Greenl. 220, 16 Am. Dec. 253; 2 Spears, 268. See conspiracy of undue influence in *Cowan v. Shaver*, 95 S. W. 200, 197 Mo. 203. But to a candid mind it can make no difference in favor of the will that the party thus urging it was so carried away by excitement or blinded by selfish motives falsely ascribed, as not to be conscious of the over-pressure he brought so indiscreetly and unfairly to bear upon its execution. And persuasion used *in extremis*, or where the testator is on his death-bed, is of all instances of persuasion the most repulsive to a court of justice. Swinburne states a humorous instance of oral will (as wills of personalty were formerly allowed to be made) to show that a dying man's answers to questions put by crafty and importunate persons ought not to be received as the free expression of his will in favor of such persons. Swinb. pt. 2, § 25, pl. 5.

<sup>2</sup> *Reichenbach v. Ruddach*, 127 Penn. St. 564, 18 A. 432; *Boyse v. Rossborough*, 6 H. L. Cas. 6; *Robinson v. Robinson*, 53 A. 253, 203 Penn. 400; *Somers v. McCready*, 53 A. 1117, 96 Md. 437; 53 A. 1125; 63 N. J. Eq. 830.

<sup>3</sup> Undue influence should not be readily imputed to a beneficiary, whose object is to claim not a legacy but the settlement thereby of a lawful claim for service rendered. *Westcott v. Sheppard*, 51 N. J. Eq. 315, 25 A. 254, 30 A. 428.

<sup>4</sup> 20 Penn. St. 329; *Eckert v. Flowry*, 43 Penn. St. 46; 127 Penn. St. 564, 18 A. 432; 117 Cal. 288, 49 P. 192, 59 Am. St. Rep. 179; 145 Ill. 405, 34 N. E. 57; *Moore v. Blauvelt*, 15 N. J. Eq. 367 (contemporaneous threats); *Woodman v. Illinois Bank*, 71 N. E. 1099, 211 Ill. 578; *Struth v. Decker*, 59 A. 727, 100 Md. 368. But while threats, violence, or any undue influence exerted in the past, shown as isolated facts and in no way connected with the testamentary act, cannot be adduced to impeach it, conduct of this sort which bears actually upon the execution of the instrument in controversy, and is directly connected with it, though somewhat remote as to the point of occurrence, may aid in avoiding the will upon which it operated. Cf. *Davis v. Calvert*, 5 Gill & J. 269, 303, 25 Am. Dec. 282, with *Eckert v. Flowry*, *supra*; *Chandler v. Ferris*, 1 Harring. 454; *Rutherford v. Morris*, 77 Ill. 397; *Jencks v. Court of Probate*, 2 R. I. 255. See also *Boyse v. Rossborough*, 6 H. L. Cas. 6; *Ketchum v. Stearns*, 76 Mo. 396; 99 S. W. 969, 30 Ky. Law 948.

<sup>5</sup> 229 Ill. 557, 82 N. E. 365.

It is also observable, that if the alleged fraud, constraint or undue influence was actually removed after the will was made, and the testator had ample intelligence and opportunity while he lived to revoke if he saw fit and dispose of his property differently, the fact that he makes no such effort tends to negative such allegation.<sup>1</sup>

233. **The making a will need not originate with the testator,** nor is proof to that effect requisite, provided it be shown that the deceased intended the instrument as his own, and completely understood, adopted, and sanctioned whatever disposition was proposed or suggested to him, and embodied in that instrument.<sup>2</sup> The will at all events must be mentally and voluntarily his.<sup>3</sup>

234. **A will invalidated for fraud, force, or undue influence,** fails necessarily, not only as to the person exerting it, but as to all for whom a benefit was thereby procured.<sup>4</sup>

235. **To apply these maxims to the domestic relation.** Threats of personal estrangement or non-intercourse, addressed by a child to a dependent parent, or threats of litigation between the children, or threats of physical injury may thus destroy the parental disposition upon which they operated.<sup>5</sup> On the other hand, the natural influence acquired by one in the parental or filial relation may be allowed its just and natural operation, as powerful, beyond that of the most intimate friends.<sup>6</sup>

236. **As to wife or mother,** the wife has been treated with a marked indulgence in testamentary cases which involve issues of this kind; out of consideration, as it would appear, to her sex and

<sup>1</sup> Coleman's Estate, 185 Penn. St. 437, 443, 40 A. 69; Mather's Will, 56 A. 982, 76 Vt. 209; Deck v. Deck, 82 N. W. 293, 106 Wis. 470.

<sup>2</sup> Constable v. Tufnell, 4 Hagg. 477; s. c. on appeal, 3 Knapp, 122; Jones v. Jones, 14 B. Mon. 464; 4 Bradf. 138.

<sup>3</sup> If any part or clause, or the whole instrument itself, was first suggested to the testator by another person and adopted by the testator, such adoption must not be the result of his incapacity or weakness of mind, nor of fraud, circumvention, force, or undue influence; and whether it be so, the trier or jury must decide from all the facts and circumstances presented. 5 Gill & J. 269; White's Will, 121 N. Y. 406, 24 N. E. 935; Chappell v. Trent, 90 Va. 849, 19 S. E. 314.

<sup>4</sup> Davis v. Calvert, 5 Gill & J. 269, 25 Am. Dec. 282. But see *post*, 248-250.

<sup>5</sup> Moore v. Blauvelt, 15 N. J. Eq. 367; 68 N. E. 526, 204 Ill. 384; Hartman v. Strickler, 82 Va. 225; Robinson v. Robinson, 53 A. 253, 203 Penn. 400; Sickles' Will, 53 A. 1125, 64 N. J. Eq. 791.

<sup>6</sup> 2 N. J. Eq. 82; Gilreath v. Gilreath, 4 Jones Eq. 42; Sechrest v. Edwards, 4 Met. (Ky.) 163; 60 N. Y. Supr. 398. A parent's will is not to be set aside for discriminating in favor of dutiful and affectionate adult children as against those who have failed in filial duty and affection or have wilfully opposed the parent's wishes or behaved with harshness and disrespect. Pensyl's Will, 157 Penn. St. 465, 27 A. 669; McFadin v. Catron, 120 Mo. 252, 25 S. W. 406; 65 N. Y. S. 605; 77 N. Y. S. 513; 54 A. 97, 64 N. J. Eq. 327. More than this, the natural love which is felt for one child above another has been recognized as a sufficient ground for testamentary preference. McFadin v. Catron, 120 Mo. 252, 25 S. W. 506; Hook's Estate, 56 A. 428, 207 Penn. 203.

marital position, which incline her to persuasive, tender, and persistent, rather than forcible and overruling methods of influence, and to the impression which popularly obtains, moreover, that a true and faithful spouse is not likely to gain more under her husband's will than she really deserves.<sup>1</sup> The momentous influence which a spouse may wield in this closest and tenderest of all relations cannot be easily impeached as for undue advantage.<sup>2</sup> A mother's influence is not likely to be unwisely exercised as among her own children; but where the claims of step-children conflict with those of her own offspring, her kindred, or herself, undue influence or fraud may be more readily inferred from her suspicious conduct.<sup>3</sup> On the other hand, the wife of a later marriage may be found seeking to set aside a will on the ground that her husband's father or the children of a former marriage unduly influenced the testator against her.<sup>4</sup> Such a complaint, and the complaint of any wife against her husband's will, may involve an inquiry into her conduct and character. The influence of a lawful

<sup>1</sup> Hence a wife's pleading, and even her importunity with her husband, seldom avoids a will made under its influence, so long as it may be supposed that the husband weighed and deliberated for himself, and that she practised no deception upon him; and, generally speaking, a wife may justly influence the making of her husband's will for her own benefit or that of others, so long as she does not act fraudulently or extort benefits from her husband when he is not in condition to exercise his faculties as a free agent. 1 Cox, 355; Parfitt v. Lawless, 2 P. & D. 462, 470; 4 Me. 220, 16 Am. Dec. 233; 22 Wend. 526, 34 Am. Dec. 340; 2 Brev. 403; Pierce v. Pierce, 38 Mich. 412; Zimmerman v. Zimmerman, 23 Penn. St. 375; 16 S. & R. 403; Rankin v. Rankin, 61 Mo. 295; Hughes v. Murtha, 32 N. J. Eq. 701; Meeker v. Meeker, 75 Ill. 280; Orth v. Orth, 145 Ind. 206, 42 N. E. 277, 44 N. E. 17, 57 Am. St. Rep. 185, 32 L. R. A. 298; Peterson's Will, 48 S. E. 561, 136 N. C. 13 (property left to wife to exclusion of testator's collateral kin); 29 App. D. C. 300 (may give all to wife excluding children, or leaving her to finally determine among them).

<sup>2</sup> Yet each case furnishes its own criterion; for, after all, duress and deception are the sole attributes of neither sex. Gardner v. Gardner, 22 Wend. 526, 34 Am. Dec. 340, cases *supra*; Styles, 427 (free agency overcome); 2 Paige, 147, 21 Am. Dec. 81. And if the wife's efforts were specially directed to procuring a will peculiarly acceptable to herself and prejudicial to others, or a will after her own precise dictation, this should be taken against her. Small v. Small, 4 Me. 220, 16 Am. Dec. 253; Beaubien v. Cicotte, 12 Mich. 459. More than this, when a wife's malevolence against an own child causes her to unduly influence the husband and father to disinherit that child, the will should not stand. Perret v. Perret, 131 Penn. St. 131.

<sup>3</sup> Mullen v. Helderman, 87 N. C. 471; Boyse v. Rossborough, 6 H. L. Cas. 6, *per* Lord Cranworth. Cf. Nicewander v. Nicewander, 151 Ill. 156, 37 N. E. 698. In mercenary marriages, of which those of old and wealthy men with a second wife furnish numerous examples, whatever shows heartlessness on the wife's part towards either the testator or those justly entitled to share with herself in his bounty, must needs prejudice her case. Harrel v. Harrel, 1 Duv. 203; 90 Ill. 134, 32 Am. Rep. 15. See Cheney v. Goldy, 80 N. E. 289, 225 Ill. 394, 116 Am. St. Rep. 145; Tyner's Estate, 106 N. W. 898, 97 Minn. 181 (exclusion of own children in favor of wife's relations).

<sup>4</sup> Gaither v. Gaither, 20 Ga. 709.



wife, we may add, is differently regarded from that of one who has knowingly cohabited illegally with the testator.<sup>1</sup>

237. **A husband's undue influence may be more readily predicated than that of a wife over her husband.**<sup>2</sup> But the wisdom and policy of preserving the confidence of the marriage relation inviolate bear against a suspicious scrutiny in the case of either spouse.<sup>3</sup>

238. **The fraud, force, or undue influence we are considering must not only have been practised:** it must, besides, have taken effect, misleading or overcoming the testator.<sup>4</sup> It must have induced the will, or, at least, have affected the provisions of the will in essential particulars; it must have substituted something fraudulently of which the testator took no intelligent cognizance, or by a sort of duress extorted from him an unwilling disposition, or by some method more insidious, turned the natural current of his interests and affections into some strange and contrary channel. It must have produced, in short, a disposition differing essentially from what the testator would have made if left free to act for himself.<sup>5</sup> Whether, then, the will were contested for incapacity or for

<sup>1</sup> 41 Penn. St. 412, 80 Am. Dec. 620, 51 A. 501; *Kessinger v. Kessinger*, 37 Ind. 341; *Monroe v. Barclay*, 17 Ohio St. 302; 13 S. & R. 323; 95 Wis. 331; *Langford's Estate*, 108 Cal. 608. But unlawful cohabitation with the mother of a legitimate or illegitimate child does not of itself import undue influence in favor of giving a legacy to that child. *Rudy v. Ulrich*, 69 Penn. St. 177, 80 Am. Rep. 238; 61 N. Y. S. 1065. The influence of a mistress is more apt to be undue than that of a wife, because its bias is positive in the direction of perverting one's testamentary disposition from the natural legal channels. See 229 *supra*. But if one marries his mistress the former illicit relation should not prejudice her right to influence him as his lawful wife. *Maynard v. Tyler*, 168 Mass. 107, 46 N. E. 413. As to marrying one's housekeeper, see 168 Ill. 488, 48 N. E. 96. Mere inequality in the age of husband and wife, as where an old man marries a woman less than half his age, raises no unfavorable influence by itself. 83 Md. 536, 35 A. 64.

<sup>2</sup> *Marsh v. Tyrrell*, 2 Hagg. 84; *supra*, 60. See *Tawney v. Long*, 76 Penn. St. 106. That the earlier rule of our law favored the husband's right to his wife's whole personal estate, and regarded the wife's will as generally of no effect without her husband's permission, we have elsewhere seen. *Supra*, 45.

<sup>3</sup> A husband's undue influence over his wife's will is rarely established. See *Armstrong v. Armstrong*, 63 Wis. 162, 23 N. W. 407; 56 N. J. Eq. 365, 39 A. 536; *Morrison v. Thoman*, 89 S. W. 409, 99 Tex. 409; *Donnelly, Re*, 68 Iowa, 126, 26 N. W. 23.

That a husband's undue influence may vitiate his wife's will, see *supra*, 60; 11 E. L. & Eq. 106; *Marsh v. Tyrrell*, 2 Hagg. 84.

<sup>4</sup> See *Shailer v. Bumstead*, 99 Mass. 121; *supra* 232.

<sup>5</sup> Hence it is always a material and often a decisive circumstance, where fraud, force, or undue influence is charged, that the instrument of itself attempts an unjust, partial, and unnatural disposition of the decedent's estate. No will can be attacked for fraud, force, or undue influence, unless some one is wronged by it; and no one is wronged, be the disposition fair or unfair, on general principles, unless worse off under the will in question than without it. But a will should be natural; and by this our law infers not so much natural in the sense of conformity to our average human nature, as natural because conformable in the concrete, to the nature and disposition of the person who made it.

fraud or undue influence, it is always proper to inquire whether the provisions of the will are just and reasonable, and accord with the state of the testator's family relations, or the contrary; for if they are, that circumstance is decidedly favorable to sustaining the will; while, on the other hand, if it makes an inequitable distribution of the property, or one quite different from what was naturally to be expected, this circumstance tends in the opposite direction.<sup>1</sup>

239. **The burden of proving fraud or force in the procurement of a will** (unlike the simple issue of testamentary capacity<sup>2</sup>) lies upon those who contest the instrument; and anything which imputes

<sup>1</sup> *Fountain v. Brown*, 38 Ala. 72; 145 Ill. 405; *England v. Fawbush*, 68 N. E. 526, 204 Ill. 384. Cf. *Journey's Will*, 57 N. E. 1110, 163 N. Y. 595 (son-in-law of testatrix a beneficiary above her issue); 70 P. 908, 42 Ore. 345; *Hughes v. Rader*, 82 S. W. 32, 183 Mo. 630; *Townsend's Estate*, 97 N. W. 1108, 122 Iowa, 246. A will disposing quite differently from what was asked repels the idea of undue influence. *Gilman v. Ayer*, 52 A. 1131, 63 N. J. Eq. 806. Thus, if the provisions of a will executed by some old, feeble, and dependent person should be shown to differ essentially from his previously known intentions or declarations while in full mental vigor, the difference being in favor of those on whose behalf the undue influence is suspected of exercise, and the will itself grossly unequal, these circumstances would bear strongly against sustaining it. 13 Phila. 403; *Wilson's Appeal*, 99 Penn. St. 545; *Fountain v. Brown*, 38 Ala. 72; 2 Bradf. 42; *Perkins v. Perkins*, 90 N. W. 55, 116 Iowa, 253. *Slater v. Slater*, 58 A. 267, 209 Penn. 194; *Walker v. Hunter*, 17 Ga. 364; *Mitchell's Estate*, 43 Minn. 73. Gross and unaccountable inequalities in the disposition of a will require in general some satisfactory evidence, that it was the free and deliberate offspring of a rational, self-poised and clearly disposing mind. *Harrel v. Harrel*, 1 Duv. 203; *Gay v. Gillilan*, 92 Mo. 250, 1 Am. St. Rep. 712. And the fact that strangers in blood receive the testator's whole property is a suspicious circumstance, if such strangers stood in a position where opportunities to dictate the disposition might have been abused. 3 Md. 491; *Chappel v. Trent*, 90 Va. 849, 19 S. E. 314; *Credille v. Credille*, 51 S. E. 628, 123 Ga. 673, 107 Am. St. Rep. 157 (code); *Walls v. Walls*, 99 S. W. 969, 30 Ky. Law, 948. The harmony of the will with the testator's habitual disposition and affections, while physically and mentally sound, is thus eminently worthy of consideration. See *Marx v. McGlynn*, 88 N. Y. 357; *Frush v. Green*, 86 Md. 494, 39 A. 863; *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113.

But circumstances vastly important in connection with other facts, may weigh little by themselves. A seeming injustice in the will may be explained. *Lancaster v. Alden*, 58 A. 638, 26 R. I. 170. And no suspicion of undue influence, force, or fraud can rest upon simple proof that the last will differed in tenor from the testator's previously declared intentions. 1 Demarest, 512. For what testator may not, and does not, change his intentions? But the force of the fact that there was a change of testamentary intention depends mainly upon its connection with other facts; a change may be rationally or irrationally made; and if it appears on the whole that the will was the free act of a competent testator, the justice or injustice of its provisions, even to the disinheritance of offspring, cannot be alleged to defeat it. *Horn v. Pullman*, 72 N. Y. 269; *Gleespin's Will*, 26 N. J. Eq. 523. Yet, if reasons cannot be shown, and some change, some perversion appears unexplained, while the instrument discloses on its face a manifestly unjust, unnatural, and partial scheme of distribution, and more especially one which favors those having free access to the testator and full opportunity for fraud or overbearing influence, to the exclusion of those who had not, the general repugnance felt by mankind to wills harsh and unnatural may well resolve all final doubts upon the whole testimony and condemn it. See *Marshall v. Plinn*, 4 Jones L. 199; 2 Spears, 268; *Taylor v. Wilburn*, 20 Mo. 306, 64 Am. Dec. 186.

<sup>2</sup> *Supra*. 170, etc.

heinous misconduct to a party concerned and interested in its execution ought to be fairly established by a preponderance of proof.<sup>1</sup> As to undue influence, in the usual and less offensive sense, the burden of proving affirmatively that it operated upon the will in question lies still on the party who alleges it, either by direct evidence or proof of circumstances.<sup>2</sup> In any such case, however, we assume that it has already been proved satisfactorily by the proponents that the will had been duly executed by a person of competent understanding and apparently a free agent.<sup>3</sup> For a testator adjudged competent to make the will may be presumed to have known and intended its contents.<sup>4</sup>

<sup>1</sup> *Bird v. Bird*, 2 Hagg. 142; 1 *Demarest*, 584; *Stoutenburgh v. Hopkins*, 43 N. J. Eq. 577, 12 A. 689; 47 N. J. Eq. 244, 20 A. 875.

<sup>2</sup> *Boyse v. Rossborough*, 6 H. L. Cas. 6; 4 Cush. 580; *Tyler v. Gardiner*, 35 N. Y. 559; *Jackson's Will*, 26 Wis. 104; *Webber v. Sullivan*, 58 Iowa, 280, 12 N. W. 319; 38 Penn. St. 138; 59 Conn. 226, 22 A. 82, 21 Am. St. Rep. 85; 135 Mo. 608, 37 S. W. 504; 136 Mo. 414, 37 S. W. 1127; *Livingston's Appeal*, 63 Conn. 68, 26 A. 470; *Hess's Will*, 48 Minn. 504, 51 N. W. 614, 31 Am. St. Rep. 665; 115 N. W. 236, 137 Iowa, 613; *Meir v. Buchter*, 94 S. W. 883, 197 Mo. 98; 104 N. W. 452, 128 Iowa, 496; 70 S. W. 136, 169 Mo. 631; *Swearingen v. Inman*, 65 N. E. 80, 198 Ill. 255; 62 N. E. 907, 194 Ill. 408. *Edgerly v. Edgerly*, 62 A. 716, 73 N. H. 407, lays down a rule somewhat peculiar. § 491.

<sup>3</sup> Preceding chapter; *Baldwin v. Parker*, 99 Mass. 79, 96 Am. Dec. 697; *Boyse v. Rossborough*, 6 H. L. Cas. 6. See *Edgerly v. Edgerly*, 62 A. 716 (N. H. 1905).

<sup>4</sup> 88 N. Y. 357; 12 N. J. Eq. 129; *Brown v. Mitchell*, 75 Tex. 9, 12 S. W. 954. Local statutes bear sometimes upon such controversies. 54 Conn. 119, 6 A. 198.

Hence is it that isolated and disconnected circumstances are not permitted to outweigh the usual presumption of the law that a person of intelligence and capacity who executes a will does so without imposition or undue influence. Thus, the simple fact that the later will alters or modifies beneficially an earlier one is held insufficient to overcome such a presumption. 3 Redf. 52; *Struth v. Decker*, 59 A. 727, 100 Md. 368. Cf. *Selleck's Will*, 125 Iowa, 678, 101 N. W. 453; 57 Conn. 127, 17 A. 757; 25 Neb. 535, 41 N. W. 354. Or, generally, that the testator's draughtsman or one whose advice was sought by him was made executor or receives a legacy under the will. *Post v. Mason*, 91 N. Y. 539, 43 Am. Rep. 689; *Wilson v. Mitchell*, 101 Penn. St. 495; *Berberet v. Berberet*, 131 Mo. 399, 33 S. W. 61, 52 Am. St. Rep. 634; 80 Vt. 259; *Demarest*, 512; cf. 147 Ill. 370, 35 N. E. 150. Or that legitimate influence was exercised by the party who derives a benefit. See 229. For undue influence must be not only alleged but proven. *Coffman v. Hedrick*, 32 W. Va. 119. Inequality in distribution does not prove undue influence, especially if explainable, though its tendency may be considered in that direction. *Francis v. Wilkinson*, 147 Ill. 370, 35 N. E. 150; 151 Ill. 106, 37 N. E. 837; 150 Mich. 322, 114 N. W. 218; *Heath v. Koch*, 66 N. E. 1110, 173 N. Y. 629. As for forgery, undue influence, or fraud, in obtaining the testator's signature to a different instrument from that which he intended to sign, these are offences too grave to be lightly inferred from circumstances which are capable of an innocent construction. 1 *Dem.* 584; 47 N. J. Eq. 244 (conspiracy not readily suspected). Cf. 95 S. W. 200, 197 Mo. 203. And where the proof fails to connect the beneficiary in any way with the making of the particular will, this circumstance should strongly negative the exercise of undue influence by him. *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113; *Douglas's Estate*, 162 Penn. St. 567, 29 A. 715.

Even the will of a very feeble and aged testator may be upheld against circumstances justly creating suspicion, if the jury upon the whole evidence believe him to have been capable, and are not satisfied that fraud or undue influence induced the

240. But evidence in point is freely admitted, and circumstances slight of themselves, may, in connection with other facts, prove strong enough to turn the scale against the alleged will. Where the issues raised are fraud and undue influence, any evidence, however slight, tending to prove those issues, is freely admitted.<sup>1</sup> There appears at times a conflict in the cases, concerning this burden of proof, so that evidence which in one instance may be thought plainly inadequate for shifting the burden upon the proponent of the will puts him in another to repelling the unfavorable imputation which mere circumstances afford.<sup>2</sup>

execution of the instrument. See 101 Penn. St. 495. And a long lapse of time intervening between the date of execution and the testator's death, during which the testator was relieved of the constraint and might have revoked the will had he chosen, must strengthen the case in favor of its establishment. See 3 Bradf. 172; 99 Mass. 125; *Lamb v. Girtman*, 26 Geo. 625; 82 P. 57, 147 Cal. 495; 1 Rich. 80; 31 Ala. 59, 68 Am. Dec. 150; 30 Neb. 424. *Supra*, 234. Cf. 251b.

Neither general bad treatment nor general kindness will of itself establish undue influence. *Tawney v. Long*, 76 Penn. St. 106. Nor will motive and opportunity alone. *Dale's Appeal*, 57 Conn. 127, 17 A. 757; 25 Neb. 535, 41 N. W. 354; 115 N. W. 236, 137 Iowa, 613; 68 A. 756, 108 N. Y. S. 877; *Sperl's Estate*, 103 N. W. 502, 94 Minn. 421; *O'Brien's Appeal*, 60 A. 880, 100 Me. 156; 7 Oreg. 42; 136 Mo. 414, 37 S. W. 1127. Nor merely suspicious circumstances. 26 N. J. Eq. 523. And see 3 Redf. 52, 181, 384; *Thompson v. Davitte*, 59 Ga. 472; *Layman v. Conrey*, 60 Md. 286; *Keegan's Estate*, 72 P. 828, 139 Cal. 123; *Gihon's Will*, 57 N. E. 1110, 163 N. Y. 595; *Andrews, Re*, 33 N. J. Eq. 514. One may reasonably prefer the relative who has taken care of him in his last years above those who have not. 4 Redf. 54; *Kise v. Heath*, 33 N. J. Eq. 239. Or be persuaded to reward services of friend or relative by a legacy. 13 Phil. 302; *Lancaster v. Alden*, 58 A. 638, 26 R. I. 170; 138 Iowa, 326, 111 N. W. 821. Or desire to gratify a friend's wishes. *Wallen v. Wallen*, 107 Va. 131, 57 S. E. 596; *Seibert v. Hatcher*, 205 Mo. 83, 102 S. W. 962. But unreasonable changes of disposition, especially in superseding the natural objects of bounty in favor of others who give casual attention, where no relative is at hand, raise a suspicion. *Van Kleeck v. Phipps*, 4 Redf. 99. Keeping relatives away in connection with execution or afterwards is an unfavorable circumstance. *Davenport v. Johnson*, 65 N. E. 392, 182 Mass. 269; 69 P. 978. And if mental incapacity be shown, it is immaterial whether undue influence was exercised or not; for the will is sufficiently vitiated. 86 N. W. 1030, 127 Mich. 607.

<sup>1</sup> Suspicious circumstances of intervention having been shown in the preparation and execution of the will, the burden shifts for sustaining it. See 12 Mich. 459; *Clark v. Stansbury*, 49 Md. 346; *Thornton v. Thornton*, 39 Vt. 122; *Tyrrell v. Painton*, (1894) P. 151. Suspicion may at once rest upon the will in controversy, from the facts brought out as to the testator's soundness of mind. See *Marx v. McGlynn*, 88 N. Y. 357; 22 Hun, 38; 1 Redf. 238; *Barney's Will*, 70 Vt. 352, 40 A. 1027; *Harvey v. Sullens*, 46 Mo. 147, 2 Am. Rep. 491; *Ray v. Ray*, 98 N. C. 566, 4 S. E. 526. But otherwise, where the will was made by a testator of apparently good capacity, who understood and acted for himself. *Loennecker's Will*, 88 N. W. 215, 112 Wis. 461; *Bennett v. Bennett*, 50 N. J. Eq. 439, 14 A. 222.

<sup>2</sup> This discrepancy is best met, first by conceding freely that all maxims for balancing the proof of fraud, force, or undue influence, must be sensitive and variable; and next, by pointing out that the burden of impeaching a will on such grounds rests far more positively upon a contestant where the fraud, force, or undue influence in question is made a distinct issue, there being no doubt that the testator was rational, intelligent and capable, than in those cases far more common, where issues of insanity or incapacity are closely blended with these darker ones, and the proof tends to setting

241. **Fraud when proved vitiates a will.** And such fraud, it is held, need not be shown by direct and positive testimony; but any facts, however slight, bearing at all upon the point, and not wholly irrelevant, may be admitted, provided that they are strong enough, when combined, to satisfy the jury of the existence and operation of the fraud.<sup>1</sup>

242. **Issues relating to fraud, force, or undue influence, and especially the last, are generally determined** upon circumstantial evidence, and inferences drawn from a full presentation of facts inconclusive when taken separately. Hence the wide range of inquiry permitted, in cases of this description, so as to set before the jury or trier of the issue whatever bears upon the preparation of the will.<sup>2</sup> Undue influence in contests of this kind is sufficiently

aside the will on either ground. See Hoar, J., in *Baldwin v. Parker*, 99 Mass. 79, 96 Am. Dec. 697. For here the line is not easily drawn nor the burden easily fastened. Oath of subscribing witness makes *prima facie* proof of validity of will. *Hoffman v. Hoffman*, 78 N. E. 492, 192 Mass. 416; *Waters v. Waters*, 78 N. E. 1, 222 Ill. 26, 113 Am. St. Rep. 359.

<sup>1</sup> *Davis v. Calvert*, 5 Gill & J. 269, 25 Am. Dec. 282; 6 Call. 90; *Budlong's Will*, 126 N. Y. 423, 27 N. E. 945. Parol evidence is admissible both to prove or to counteract proof of a fraud; for the purpose in such a case is not to vary or control what is written, but to impeach the validity of the instrument itself. Hence oral proof may establish that one will was surreptitiously obtruded for another, and that the testator executed it ignorantly, or it may rebut a charge of that nature. *Doe v. Allen*, 8 T. R. 147, 1 Moo. & R. 525. On the question whether a certain instrument offered for probate is forged or genuine, evidence of contemporary matters tending to show a motive for forgery is admissible. *Kennedy v. Upshaw*, 64 Tex. 411.

<sup>2</sup> While the point of inquiry concerns the testator's condition, and the external influences brought to bear upon him at the time the alleged will was made, the character of those influences may invite much study of their motives, their origin, and growth, and a comparison of counteracting forces in order justly to estimate their probable effect; and as for a testator's condition, his entire moral and intellectual development is more or less involved in the issue, including his power of resolution to resist or not the pressure which is claimed to have been brought to bear upon him. *Colt, J.*, in *Shailer v. Bumstead*, 99 Mass. 121. And so, where both mental incapacity and undue influence are alleged. *Glass's Estate*, 103 N. W. 1013, 127 Iowa, 646. The inference is one of fact, and not a conclusion of law. *Horah v. Knox*, 87 N. C. 483. See *Foster v. Dickerson*, 64 Vt. 233, 24 A. 253; cases *supra*: 17 W. Va. 683, 41 Am. Rep. 682; 35 N. J. 120, 446; *Linebarger v. Linebarger*, 55 S. E. 709, 143 N. C. 229.

So, too, is it admissible to prove that former wills or former testamentary plans embodied a different purpose, as tending to show whether or not the testator has understandingly and of his own free will changed his settled plans in favor of the present arrangement; while the justice or injustice of that arrangement, the natural or unnatural character of the will offered for probate, may open a wide inquiry into family circumstances; for evidence tending to show the relation of a testator to the natural objects of his bounty, the feelings he entertained towards them, and their pecuniary condition, bears upon the issue of undue influence as well as of capacity. *Beaubien v. Cicotte*, 12 Mich. 459; *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990; *Melanefy v. Morrison*, 152 Mass. 473, 26 N. E. 36; *Crocker v. Chase*, 57 Vt. 413. Evidence showing through what line of relatives, or from what sources, the fortune bequeathed was derived, or favors received, may here have a bearing. *Glover v. Hayden*, 4 Cush. 580; *Patterson v. Patterson*, 6 S. & R. 55.

In establishing the charge of fraud or undue influence, it is further observed that "two points must be sustained: first, the fact of the deception practised or the in-

established by a preponderance of the evidence adduced; and the jury or trier of the case may draw inferences freely from facts in conflicting testimony.<sup>1</sup>

243. **Many decisions, not altogether harmonious, relate to the testator's declarations in issues of the present kind.** The general rule is, that a testator's previous declarations are admissible within a liberal range for the purpose of throwing light upon his mental condition, his exposure to constraint or fraud, and the surrounding circumstances of the testamentary act.<sup>2</sup> But a testator's declara-

fluence exercised; and next, that this fraud and influence were effectual in producing the alleged result, misleading or overcoming the party in this particular act." *Colt, J., in Shailer v. Bumstead*, 99 Mass. 121. See 63 A. 1048, 103 Md. 416; *Piper v. Andricks*, 71 N. E. 18, 209 Ill. 564. Experience shows that direct proof of undue influence or fraud is rarely attainable; but inference from circumstances collectively must determine it. *Saunders's Appeal*, 54 Conn. 108; *Stone, J., in Moore v. McDonald*, 68 Md. 321, 339, 12 A. 117.

<sup>1</sup> *Bush v. Delano*, 113 Mich. 321, 71 N. W. 628; *Caven v. Agnew*, 186 Penn. St. 314, 40 A. 480; *Smith v. Smith*, 67 Vt. 443, 32 A. 255; *Walls v. Walls*, 99 S. W. 969, 39 Ky. Law, 948; *Sibley v. Morse*, 109 N. W. 858, 146 Mich. 463; *Bradford v. Blossom*, 83 S. W. 721, 190 Mo. 110.

<sup>2</sup> See in connection with other proof of fraud or undue influence, declarations made down to the making of the will, which disclose a long-cherished purpose of disposing of one's estate quite differently from what the will provides as propounded. 12 Gratt. 196; 29 Conn. 399; *Neel v. Potter*, 40 Penn. St. 483; *Dye v. Young*, 55 Iowa, 433, 7 N. W. 678; *Moore v. McDonald*, 68 Md. 321, 12 A. 117; 106 Iowa, 203, 76 N. W. 717, 68 Am. St. Rep. 293. Or such statements showing dislike or affection for the natural objects of his bounty or for those favored in the alleged will. 16 Q. B. 751; *Shailer v. Bumstead*, 90 Mass. 112; 1 Kern. 157; *Robinson v. Adams*, 62 Me. 369, 16 Am. Rep. 473; 12 Mich. 459; *Whitman v. Morey*, 63 N. H. 448; 64 N. H. 573, 15 A. 219. A testator's previous declarations are likewise admissible in support of the will which is impeached, as showing a long-cherished purpose, or in other respects rebutting the idea of fraud or undue influence. 17 Ala. 55, 52 Am. Dec. 164; 4 Bradf. 311; *Gardner v. Frieze*, 16 R. I. 640, 19 A. 113; *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113; *Kaufman v. Caughman*, 49 S. C. 159, 61 Am. St. Rep. 808, 27 S. E. 16; 180 Ill. 300, 54 N. E. 321. But declarations of vague import may well be ruled out. 184 Penn. St. 41, 39 A. 46.

A testator's declarations and acts after the execution of a will may be alleged to show his knowledge of the testamentary character of the disposition and to dispel any possible claim of mistake or imposition. *Nelson's Will*, 141 N. Y. 152, 36 N. E. 3; 98 Ga. 552, 25 S. E. 590.

By the weight of authority a testator's declarations are admissible when they denote the mental fact at the date of execution which is to be proved, or are close enough in point of time to make part of the *res gestæ*; or where they repel the favorable inference naturally arising from the fact that an ambulatory instrument remains unrevoked after the alleged fraud or coercion has ceased to operate; or where they tend to show that the state of mind, or the feelings, opinions, peculiarities of character, existing when the alleged will was made, continued to operate, so as all the more to discredit the instrument set up as apparently the formal and deliberate expression of his will at the period in question. 8 Conn. 254, 20 Am. Dec. 100; *Robinson v. Hutchinson*, 26 Vt. 38, 60 Am. Dec. 698; 1 Kern. 157; 3 Dev. L. 442; *Richardson v. Richardson*, 35 Vt. 238; *Griffith v. Diffenderfer*, 50 Md. 466; *Potter v. Baldwin*, 133 Mass. 427; *Roberts v. Bidwell*, 98 N. W. 1000, 136 Mich. 191; *Robinson v. Robinson*, 53 A. 253, 203 Penn. 400; *Stephenson v. Stephenson*, 62 Iowa, 163, 17 N. W. 456; *Reynolds v. Adams*, 90 Ill. 134, 32 Am. Rep. 15; 66 Iowa, 754, 21 N. W. 570; *Bryant v. Pierce*, 95 Wis. 331, 70 N. W. 297; *Haines v. Hayden*, 95 Mich.

tions, whether made before or after the execution of the will, aside from *res gestæ* and the time of execution itself, are admissible chiefly to show his mental condition and capacity or the real state of his affections; they are, after all, but mere hearsay,<sup>1</sup> and they are received, rather as his own external manifestations than as evidence of the truth or untruth of facts relative to the exertion of undue influence upon him. They may corroborate but the issue calls for its own proof from the living.<sup>2</sup> There on the whole should be independent testimony indicating undue influence before the decedent's declarations are considered at all, and then they are chiefly pertinent to show a condition of mind susceptible to the sinister influence, and a testamentary act corresponding.<sup>3</sup>

244. **The declarations or admissions of parties in interest** are sometimes considered in this connection.<sup>4</sup>

352, 35 Am. St. Rep. 566. Declarations made long after the will are not, it is true, permitted by the best authorities to show by way of narrative or independently as facts, that fraud or undue influence was practised at the former and essential date of execution, for this would be to contradict by hearsay evidence, after one's death, what the solemn instrument in writing, unrevoked and witnessed, declares was his intention while living. 1 Gall. 170; *Runkle v. Gates*, 11 Ind. 95; 2 Johns. 31, 3 Am. Dec. 390; *Thompson v. Updegraff*, 3 W. Va. 629; *Vance v. Vance*, 74 Ind. 370; 99 Mass. 122; *Vanvalkenberg v. Vanvalkenberg*, 90 Ind. 433; 36 N. J. Eq. 259, 603; 4 Dutch. 274; *Merriman's Appeal*, 108 Mich. 454, 66 N. W. 372; *Underwood v. Thurman*, 36 S. E. 788, 111 Ga. 325. Such declarations are not, however, to be rejected, if admissible on other grounds like those we have indicated, and where a foundation has already been laid for bringing them in to corroborate better proof bearing upon the main issue; and it remains for the presiding judge carefully to point out how far these declarations must be rejected or received as evidence by the jury. 99 Mass. 122, and authorities cited. And see *Johnson v. Lyford*, L. R. 1 P. & D. 546. Mere declarations, whether previous or subsequent to the will, amount of themselves to very little in the face of a *prima facie* showing favorable to the instrument. See *Hoshauer v. Hoshauer*, 26 Penn. St. 404; 3 Redf. 52; 40 N. J. Eq. 520. As to testator's diaries or letters, see *Marx v. McGlynn*, 88 N. Y. 357. Declarations of the testator's feelings when admitted may be shown to have no foundation in fact. *Canada's Appeal*, 47 Conn. 450. As to conversations, see *Potter's Will*, 55 N. E. 387, 161 N. Y. 84. And evidence of declarations expressing only dissatisfaction with one's will is irrelevant. *Ryman v. Crawford*, 86 Ind. 262; 28 Minn. 9; *Robinson v. Stuart*, 73 Tex. 267. 11 S. W. 275. See further, *Mueller v. Pew*, 106 N. W. 840, 127 Wis. 288; 78 N. E. 1, 222 Ill. 26, 113 Am. St. Rep. 459 (excluded). And see *supra*, 192, 193.

<sup>1</sup> 99 Mass. 122; *Vivian's Appeal*, 50 A. 797, 74 Conn. 257; 65 P. 315, 133 Cal. 131.

<sup>2</sup> *Bush v. Bush*, 87 Mo. 480; *Middlewich v. Williams*, 45 N. J. Eq. 726, 17 A. 826; *Herster v. Herster*, 122 Penn. St. 239, 16 A. 342, 9 Am. St. Rep. 95; 40 N. J. Eq. 520; 153 Mass. 487, 26 N. E. 1114; *Eastis v. Montgomery*, 93 Ala. 293, 9 So. 311; *Crocker v. Chase*, 57 Vt. 413, 68 A. 756; 73 P. 1081, 140 Cal. 390; 97 N. W. 1108, 122 Iowa, 246; *Hobson v. Moorman*, 90 S. W. 152, 115 Tenn. 73, 3 L. R. A. (N. S.) 837; *Linebarger v. Linebarger*, 55 S. E. 709, 143 N. C. 229; *Miller's Estate*, 88 P. 338, 31 Utah, 415 (conduct of party as *res gestæ*); *Cheney v. Goldy*, 80 N. E. 289, 225 Ill. 394, 116 Am. St. Rep. 145; *Townsend's Estate*, 105 N. W. 110, 128 Iowa, 621. The more remote such declarations from the time when the will was executed, the less becomes their value. Declarations impertinent to the issue, moreover, are not admissible at all. 134 U. S. 47, 33 L. Ed. 805.

<sup>3</sup> *Kirkpatrick v. Jenkins*, 96 Tenn. 85, 33 S. W. 819.

<sup>4</sup> As in contests which involve a testator's mental capacity (*supra* 195), so is it with issues of fraud and undue influence, that the declaration or conduct of a legatee or

245. **The circumstance that a party who derives under the will a disproportionate benefit** or a benefit to which he had no natural claim is the party who drew it lends disfavor to the instrument in issues of the present kind, and may turn the scale against its admission to probate.<sup>1</sup> Suspicion gains additional force if it appears that the testator was feeble-minded and liable to coercion; or if such beneficiary actively directed the execution of the will.<sup>2</sup> But on due explanation given, as all the evidence shows, and the suspicion removed, the will stands, upon full scrutiny, no matter who prepared it.<sup>3</sup> Nor is the testamentary act void, though the person

party in interest is not to be shown in evidence by way of an admission against interest, so long as other parties who would be affected thereby are not jointly interested nor in privity with him. *Shailer v. Bumstead*, 99 Mass. 129, and cases cited. The declarations against their interest of legatees who are not parties to the proceedings in court are in general inadmissible. 99 Mass. 129; *Carpenter v. Hatch*, 64 N. H. 573, 15 A. 219. But the admissions and declarations of a sole legatee may be thus proved against his interest; and courts have been disposed to admit such evidence for the purpose of setting aside, if possible, the legacy of any one who has thus confessed himself a party to the fraudulent procurement of a will. 8 Greenl. 42; 13 S. & R. 323; *Fairchild v. Bascomb*, 35 Vt. 398. And see *Bush v. Bush*, 80 Mo. 480; *Saunders's Appeal*, 54 Conn. 108, 6 A. 193; 54 N. Y. S. 77; *Morris v. Stokes*, 21 Geo 552; *Blakely v. Blakely*, 33 Ala. 611; *Shailer v. Bumstead*, 99 Mass. 129; *Dotts v. Fetzer*, 9 Penn. St. 88; *Jackson v. Jackson*, 32 Ga. 325; *Crocker v. Chase*, 57 Vt. 413 (as to husband of a legatee).

<sup>1</sup> The universal maxim of law treats one who writes himself the heir as ending suspicion to the writing. The civil law made little of setting aside any will which was written or prepared by the party deriving the essential benefit under it. 1 Redf. Wills, 158, 159; 1 Wms. Exrs. 351. Our common law jurisdiction does not adopt this rule in its full stringency; nevertheless a sense of propriety and delicacy clearly suggests that one who is to be directly benefited by a will to the considerable detriment of others in legal interest, should refrain from drafting or conducting the execution of it; and it is well settled that any will, prepared or procured by one thus interested in its provisions, imposes an additional burden, if assailed, upon those who seek to establish it. *Barry v. Butlin*, 1 Curt. 637; s. c., 2 Moore P. C. 480; 2 Phillim. 323; 23 N. Y. 9, 80 Am. Dec. 235; *Delafield v. Parish*, 25 N. Y. 9; *Duffield v. Morris*, 2 Harring. 375; 5 Ga. 456; 24 Ga. 325, 71 Am. Dec. 127; 1 Dev. & Bat. 82; *Gerrish v. Nason*, 22 Me. 438, 39 Am. Dec. 589; *Cuthbertson's Appeal*, 97 Penn. St. 163; *England v. Fawbush*, 68 N. E. 526, 204 Ill. 384; 7 Humph. 320; *Adair v. Adair*, 30 Ga. 102; *Cheatham v. Hatcher*, 30 Gratt. 56, 32 Am. Rep. 650.

<sup>2</sup> *Smith v. Henline* 174 Ill. 184, 51 N. E. 227.

<sup>3</sup> *Rusling v. Rusling*, 36 N. J. Eq. 603; 4 Redf. (N. Y.) 441; 45 N. J. Eq. 173, 16 A. 690. A court need not instruct a jury that the fact that the draftsman is largely benefited under the will is always a suspicious circumstance. 64 Md. 138, 21 A. 273. And see *Carpenter v. Hatch*, 64 N. H. 573, 15 A. 219; 67 N. H. 520, 42 A. 47.

The mere presence of a beneficiary under a will at its execution is not improper, suspicious or objectionable, where no proof appears that he actively instigated the business. *Ethridge v. Bennett*, 9 Houst. 295; *Bennett v. Bennett*, 50 N. J. Eq. 439, 26 A. 573. And wherever the testator's draftsman or manager of the execution may be thought worthy of some generous token, undue influence and fraud are not to be presumed from the fact that the will gives him accordingly. *Post v. Mason*, 91 N. Y. 539, 43 Am. Rep. 689; 111 N. Y. 239, 18 N. E. 874; *Carter v. Dixon*, 69 Ga. 82; *Trubey v. Richardson*, 79 N. E. 592, 224 Ill. 136. See *McEnroe v. McEnroe*, 51 A. 327, 201 Penn. 477 (drew will at request and absent from execution); 108 Penn. 395, 56 Am. Rep. 231. The extent of his benefit as compared with that of natural objects of one's bounty is a matter of some consequence.



who makes the will in his own favor is the agent and attorney of the testator; and yet suspicion against the will becomes all the stronger in proportion as the testator was weak-minded, ignorant, or feeble, and must have confided in his draftsman's superior skill and experience.<sup>1</sup>

246. **In general, the existence of a confidential relation, as between guardian and ward, attorney and client, physician and patient, or even religious adviser and layman, is of a nature which implies peculiar opportunities outside the family relation, for influencing duly or unduly the making of a will contrary to the natural disposition of blood or marriage. Such opportunities must not be abused; and whenever a will appears to have been procured through the zealous intervention of one occupying this favored position, to his own especial advantage, and to the prejudice of natural objects of one's bounty, and especially where the relation is of external origin and development as respects the testator's family, fraud and undue influence will readily be inferred, unless all jealous suspicion is put to rest by the evidence adduced to sustain it.**<sup>2</sup>

<sup>1</sup> 4 Hagg. 391; 3 Hagg. 587; *St. Leger's Appeal*, 34 Conn. 434, 91 Am. Dec. 742; 174 Penn. St. 373, 34 A. 603; 56 N. J. Eq. 766, 41 A. 422. It is by no means uncommon in our States at this day, though a practice liable to abuse, for professional advisers to draw up wills which confer upon themselves all the influence and emolument of executor and trustee. Should the adviser write himself down, besides, for a legacy unreasonably great, being no natural claimant upon the testator's bounty, the will ought to be looked upon with no little suspicion. See *Cramer v. Crumbaugh*, 3 Md. 491. See also *Carter v. Dixon*, 69 Ga. 82; *Garrett v. Heflin*, 98 Ala. 615, 13 So. 326, 39 Am. St. Rep. 89; *Post v. Mason*, 91 N. Y. 539. And the conduct of a professional man has sometimes avoided the will prepared by him on the ground that he allowed the testator to remain ignorant of legal consequences, where the effect was to influence the instrument in his own favor or so as artfully to divert the disposition from that intended. *Walker v. Smith*, 29 Beav. 394; 5 De G. M. & G. 301; *Lyon v. Dada*, 111 Mich. 340, 69 N. W. 654.

In *Barry v. Butlin*, 1 Curt. 637 (1838), Baron Parke announces in terms the rule which requires the court's suspicion to be overcome, before probate is granted of a will which is written or prepared by the party who takes a benefit under it. See also *Coffin v. Coffin*, 23 N. Y. 9, 80 Am. Dec. 235.

Sinister conduct attending the execution of such a will, as shown in keeping those away who were adversely interested, taking exclusive custody of the instrument after it was signed, etc., bear unfavorably against a draftsman. *Hollingsworth's Will*, 58 Iowa, 526, 12 N. W. 584; *Drake's Appeal*, 45 Conn. 9. Or that the draftsman made alterations of the instrument in his own favor under such circumstances. *Yardley v. Cuthbertson*, 108 Penn. St. 395. But secrecy maintained in making or executing the will may be satisfactorily explained. 231. See unfavorable circumstances in *Lyon v. Dada*, 111 Mich. 340, 69 N. W. 654; *Caven v. Agnew*, 186 Penn. St. 314, 40 A. 480.

<sup>2</sup> See cases cited in preceding section; *Harvey v. Sullens* 46 Mo. 147, 2 Am. Rep. 491; *Tyler v. Gardiner*, 35 N. Y. 559; *Moore v. Spier*, 80 Ala. 129; *Chappell v. Trent*, 90 Va. 849, 19 S. E. 314; 70 Vt. 352, 40 A. 1027; 93 N. Y. S. 364; *Cowdry's Will*, 60 A. 141, 77 Vt. 359; 100 N. Y. S. 492; 88 P. 338, 31 Utah, 415; 226 Ill. 422, 80 N. E. 992; *Mowrey v. Norman*, 204 Mo. 173, 103 S. W. 15; *Yardley v. Cuthbertson*, 108 Penn. St. 395, 56 Am. Rep. 218; *Meek v. Perry*, 36 Miss. 190 (ward and guardian).

Such an unfavorable suspicion amounts to nothing more than a presumption of fact and many be overcome by proof that a testator of suitable intelligence made his will as he saw fit. 1 Con. (N. Y.) 18; 46 N. J. Eq. 515, 22 A. 125. Evidence that the testator made unequal gifts among his next of kin during his life is admissible. *Eastis v. Montgomery*, 93 Ala. 293, 9 So. 311; 186 Penn. St. 314, 40 A. 480; 245; 18 Pick. 115. Indeed, the confidential relation that one holds may often explain, especially in a family relationship, why the testator has desired to bestow generously upon him. *Lamb v. Lippincott*, 115 Mich. 611, 73 N. W. 887.

Equity appears often to have so far presumed a fraud, where one holding such a confidential relation takes any gift, as, at least, to have imposed upon him the onus of disproving it. Certainly no such strict rule pertains to the law of wills; and in gifts of this character the beneficiary may have been utterly ignorant of the giver's intentions, and stand entirely clear of personal influences upon the disposition; while the gift itself remains revocable and may only be disclosed at the donor's death, when the essential question to be answered is, what disposition shall take effect upon his estate, and when others in interest and not the donor himself, are parties to any litigation for setting the gifts by his purported disposition aside. All that can be safely said is, that the especial gift, together with the opportunity for procuring it, affords ground for suspicion. The superiority attached to such an influence is its distinguishing trait; the relation being such that the testator, especially if of weak or declining power, leans upon a guide, in whose honor he must confide, and that honor a court of equity is bound to insist upon. Yet the strength of the suspicion in each case must depend upon its own circumstances.

The existence of friendly relations does not impute undue influence in obtaining a legacy. *Stametz v. Mitchenor*, 75 N. E. 579, 165 Ind. 672. Nor a relation as mere housekeeper and nurse. *Richardson v. Bly*, 63 N. E. 3, 181 Mass. 97. Nor one's peculiar confidence and consultation as to favored kindred. *McLaughlin's Will*, 59 A. 892, 69 N. J. Eq. 379. Nor a partnership relation. *Brook's Estate*, 54 Cal. 471. No confidential adviser is to be suspected unless in fact beneficially interested under the will. *Birdseye, Re*, 60 A. 111, 77 Conn. 623; 104 N. W. 452, 128 Iowa, 496. And participating actively in the business of execution. *McQueen v. Wilson*, 31 So. 94, 131 Ala. 606; *Cornell's Will*, 57 N. E. 1107, 163 N. Y. 608; *Folks v. Folks*, 54 S. W. 837, 107 Ky. 561. And see 72 N. Y. S. 421; *Robinson v. Robinson*, 53 A. 253, 203 Penn. 400; 93 N. Y. S. 1065; 94 N. Y. S. 1064; 55 A. 747, 25 R. I. 305 (dissolute and brief companionship with a woman); *Stewart v. Lyons*, 47 S. E. 442, 54 W. Va. 665; *Bristed v. Weeks*, 5 Redf. 529; *Sper's Estate*, 103 N. W. 502, 94 Minn. 421 (equity sets bequest aside); *Parfitt v. Lawless*, L. R. 2 P. D. 462.

To sustain a will made in favor of the testator's religious adviser, to the exclusion of the natural objects of his bounty, there must be some proof besides the making of it. But if the will is shown a consistent one, and freely and intelligently made, it will be sustained. *Marx v. McGlynn*, 88 N. Y. 357; 4 Redf. 455; 6 Dem. 166. Even where a religious adviser draws or actively prepares a will in favor of the church or charitable institution which he represents, ignoring the natural heir, slight circumstances may justify a jury in inferring undue influence. *Id.*; 5 Mo. App. 390; *Welsh, Re*, 1 Redf. 238; *McEnroe v. McEnroe*, 51 A. 327, 201 Penn. 477. Cf. *Drake's Appeal*, 45 Conn. 9. Where a testator embraces spiritualism, and the medium or adviser alienates his affections from his family and procures a will in his own favor, it should be set aside. *Thompson v. Hawks*, 14 Fed. Rep. 902; 7 Oreg. 7. As to legacies to one's spiritual adviser, see further, 88 Ala. 462, 7 So. 260; 51 A. 118, 63 N. J. Eq. 242. As to a physician who was made sole legatee, see 6 Dem. 299.

The benefit thus derived by one who holds a confidential relation need not be a strictly personal one in order to excite suspicion; for undue advantages procured for those of his own household, or church fellowship, for institutions or business establishments in which he is strongly interested, and the like, may in a broad sense be intended for his own benefit; and so, too, where, to gratify some dislike of his own, he gets the testator to disinherit a blood relation. See *Welsh, Re*, 1 Redf. 238; *Drake's Appeal*, 45 Conn. 9. Cf. *Barkley v. Cemetery Assn.*, 54 S. W. 482, 153 Mo. 300; *Bridwell v. Swank*, 84 Mo. 455 (bequest to guardian's wife). And see 43 N. J. Eq. 154, 10 A. 862. But the fairer and more disinterested the influence he exerts, the less does the confidential adviser expose himself to suspicion. 116 Penn. St. 612, 11 A. 410; 6 Dem. 84; *Grove v. Spiker*, 72 Md. 300.

247. **Proof that the testator knew the contents of the will** and approved them may bear where error, fraud or undue influence is charged.<sup>1</sup>

248. **Probate in part**, where fraud or undue influence operated in part, is favored whenever practicable. And thus the whole will is not necessarily vitiated, but the gifts thus wrongfully obtained may be declared invalid while the will is in other respects admitted to probate.<sup>2</sup> In other words, where part of a will has been introduced through fraud, or perhaps error and inadvertence, it may be rejected, and probate granted of the residue, if the two are severable; but not otherwise.<sup>3</sup>

249. **On the other hand, a full probate does not absolutely conclude full validity**, as provisions appear expressed, but construction or further litigation may establish to the contrary.<sup>4</sup> If the will

<sup>1</sup> In ordinary cases the formal execution of the will by a person who can read and write imports a knowledge of its contents. 5 Ga. 456; 20 Ga. 709; 7 Baxt. 550; *Vernon v. Kirk*, 36 Penn. St. 268; 10 N. H. 514; 1 Dev. & B. 82; 4 Harring. 350. But where it is shown that the testator, being blind, illiterate, or very feeble, could not have gained this knowledge unaided, more positive proof that he actually knew and assented is required to repel any suspicion which circumstances may have cast upon the good faith of the transaction. *Davis v. Rogers*, 1 Houst. 44; *Hughes v. Meredith*, 24 Ga. 325, 71 Am. Dec. 127; *Kelley v. Settegast*, 68 Tex. 13, 2 S. W. 870; 115 Penn. St. 32, 2 Am. St. Rep. 525, 8 A. 219; *Lyons v. Campbell*, 88 Ala. 462, 7 So. 250; *Wilbur v. Wilbur*, 129 Ill. 392. See 100 N. Y. S. 422. It is not necessary to prove that the will was read over to the testator, nor to show written instructions from him; but it should appear that in some way its contents were correctly imparted to him and corresponded with his wishes. *Ib.*; *Barry v. Butlin*, 1 Curt. 637; 2 Bradf. 261; 43 Penn. St. 73, 82 Am. Dec. 551; *Day v. Day*, 2 Green Ch. 549. See 1 Harring. 454 (alterations made). And it should be borne in mind, that where fraud or undue influence is imputed, proof of the testator's actual knowledge of contents and soundness of mind do not alone establish the will, but his free volition should appear besides. *Yardley v. Cuthbertson*, 108 Penn. St. 395, 56 Am. Rep. 218.

<sup>2</sup> *Allen v. M'Pherson*, 1 H. L. Cas. 191; 1 Jarm. 36; 1 Redf. 238; *Morris v. Stokes*, 21 Geo. 552; *Harrison's Appeal*, 48 Conn. 202; 54 Conn. 119, 6 A. 198. And see Exrs. 85, *post*. So, too, the wrongful alteration or insertion of a pecuniary legacy in a will, by the legatee or a stranger, is held not to avoid the will as to other respects. 1 Gall. 170; *Morrell v. Morrell*, 7 P. D. 68. And the same would appear to hold true where such alteration has been innocently made. *Ib.* And see *Whitlock v. Wardlaw*, 7 Rich. 453; 91 Penn. St. 236; *Wombacher v. Barthelme*, 62 N. E. 800, 194 Ill. 425 (fraudulent insertion of executor's name, etc.). For if the fraud or error tended plainly to some partial and particular result, while the instrument as a whole embodied the disposition of a person of sound and disposing mind and free volition, the testator having fully determined to make his will, innocent legatees ought not to be punished indiscriminately with those who were in the wrong. But to separate for probate the volition and non-volition portions of a will is not commonly practicable; for fraud and undue influence are found usually to have permeated the whole disposition and even to have set the alleged testator to making it. *Florey v. Florey*, 24 Ala. 241; 1 Redf. (N. Y.) 238; 2 Redf. 179.

<sup>3</sup> *Rhodes v. Rhodes*, 7 App. Cas. 192. A codicil which ought to fail is thus severable from a valid will and prior codicils. See *Ogden v. Greenleaf*, 143 Mass. 349, 9 N. E. 745; 234, *supra*.

<sup>4</sup> As if a person too young under the statute to make a will of realty, but old enough to make one of personalty, should execute a testament embracing both kinds. *Dickin-*

may take effect in any part, it is properly admitted to probate, notwithstanding some of its provisions should prove void eventually from one cause or another.<sup>1</sup>

250. **In fact, courts of probate exercise complete control over the will,** in case of fraudulent insertion or alteration, or of incapacity during the execution of some specific part of the will.<sup>2</sup>

251. **As to inspection of the instrument,** where the issue of mental capacity or undue influence is raised, and a jury tries the question of fact, authentication in probate in due form of law should be determined by the court. But the instrument in contest may be submitted for inspection to the jury; and there is no impropriety in allowing this inspection, before the evidence is given, but often the reverse, since the evidence must be tested by the instrument in question.<sup>3</sup>

251a. **Mental capacity and undue influence are distinct issues** in controversies of this kind, and probate may be refused on the one ground or the other, as well as on both grounds.<sup>4</sup>

251b. **A subsequent parol assent by the testator,** after the sinister pressure is removed, cannot alone make valid a will which was invalid when actually executed, by reason of undue influence or coercion; for there must be republication by him such as the law permits, or else a new will.<sup>5</sup>

son v. Hayes, 31 Conn. 417. But cases of this sort can seldom arise outside the probate court, as legislation now provides. See *supra*, 39-44. Or where the will can be pronounced inoperative and void in parts, in consequence of the subject-matter and the character of the disposition attempted. Bent's Appeal, 35 Conn. 523; 38 Conn. 26. And see 1 Pick. 239; 156 Mass. 483, 31 N. E. 638.

<sup>1</sup> George v. George, 47 N. H. 27. And see 452a; Exrs. 85.

<sup>2</sup> Welsh, *Re*, 1 Redf. 238, 248; Ogden v. Greenleaf, 143 Mass. 349, 9 N. E. 745. A word or clause in the will introduced by mistake or fraud, without the testator's knowledge or approval, may, at judicial discretion, be stricken out, leaving a court of construction to supply the true meaning. Morrell v. Morrell, 7 P. D. 68; 2 S. & T. 590; Rockwell's Appeal, 54 Conn. 119, 6 A. 198. A will defaced or mutilated by a testator while *non compos* is, if possible, to be pronounced for in its original integrity. Scruby v. Fordham, 1 Add. 74; 3 Hagg. 754; Batton v. Watson, 13 Geo. 63, 58 Am. Dec. 504. Codicils, moreover (which are as much a part of wills as if actually incorporated into the instrument, and draw the will down to their date), are on similar grounds rejected, leaving the will to operate without one or another of them, as justice may require. 7 Phillim. 57; 4 Bro. C. C. 55; 1 Phillim. 187; 1 Wms. Exrs. 42; 1 Bradf. 360; 143 Mass. 349, 9 N. E. 745. And see Exrs. 85.

<sup>3</sup> Rees v. Stillè, 38 Penn. St. 138. The instrument offered should of course be considered in connection with the other evidence adduced, and not by itself alone. Vance v. Upson, 66 Tex. 476, 1 S. W. 179; Middlewich v. Williams, 45 N. J. Eq. 726, 17 A. 826.

<sup>4</sup> See Dexter v. Codman, 148 Mass. 421, 19 N. E. 517, where the court set aside the finding of a jury on the former ground, but sustained it on the latter.

<sup>5</sup> Chaddick v. Haley, 81 Tex. 617, 17 S. W. 233; 441-450, *post*. But parol acts of the testator after execution, importing an assent, may repel the inference that coercion or undue influence had been exerted. See 234, 239, *supra*, and cases cited.

## PART III.

## FORMAL REQUISITES OF A WILL.

## CHAPTER I.

## WHAT CONSTITUTES A WILL.

252. **Wills are either written or oral, as to their nature.** But at the present day, the statutes both of England and the various American States, insist that, with a few stated exceptions, all wills, whether relating to real or personal property, or to both, shall be expressed in writing; and moreover that this written instrument shall be formally executed in presence of a stated number of witnesses.<sup>1</sup>

253. **Real and personal property are now treated alike as to execution; but it was not so formerly.**<sup>2</sup>

<sup>1</sup> The effect of such legislation is to abolish much of the old learning which pertains to the subject, and leave our testamentary law to shape itself in a modern and more precise mould. Even so recent a writer as Blackstone ceases to be a standard authority on this point. Cf. 2 Bl. Com. 501, 502, commenting upon Stat. 29 Car. II, c. 3; Stat. 1 Vict. c. 26 (1837); *supra*, 14-16. This unquestionably was English law when Blackstone discoursed; but what that eminent expounder pointed out as the safer and more prudent way, and indeed the method which in Bracton's early time borrowed a sanction from Roman jurisprudence, namely, that the will be signed [or sealed] by the testator, and published in the presence of witnesses, has, since 1838, become, for real and personal property alike, the imperative rule in England; 2 Jarm. Wills, Appendix; while in this country, where the feudal system never found a chance to take root, local experience brought various local legislatures severally to the same discreet and harmonizing policy. 29 Car. II put the first strong curb in both countries upon frauds and perjuries in wills of personal property; and from that landmark of legislation the sturdy sense of both England and most American States worked independently towards the more radical reform, here embodied in various local enactments differing somewhat in general principle, but there in the statute of 1 Vict. c. 26, passed in 1837, and familiarly styled the Statute of Wills.

<sup>2</sup> By Stat. 1 Vict. c. 26, the same formalities concerning execution and attestation (but with two instead of three witnesses) are prescribed for property of every description; and upon all wills made in English jurisdiction later than 1837 does this rule operate. See preface to 1 Wms. Exrs.; 2 Jarm. Wills, Appendix. The term "will" in our modern legislation has a broad scope, and may usually be said to include every kind of testamentary act taking effect from the mind of the testator and manifested by an instrument in writing. Bayley v. Bailey, 5 Cush. 245.

In this country the prevailing policy at this day makes no distinction of formalities between the different kinds of property; but the will, whatever the description of property to which it relates (and property real, personal, or mixed, are in these days usually embraced together), requires the same mode of subscription and attestation. The legislation of most of our American States on this subject is based upon the old

254. But our American statutes relating to wills are of local and independent origin; and though their strong tendency is to harmonize in general essentials, they always differed and must continue to differ in particulars as well as mode of expression; and while the local disinclination to change such statutes is founded in obvious reasons, every radical change in State legislation must be held to operate by its local date of enactment.<sup>1</sup>

255. **Holograph wills, or those written out by the testator's own hand, stand, under the policy which now prevails throughout England and most parts of the United States, on no privileged footing, but require to be attested like any other testaments.**<sup>2</sup> Of such wills of chattels, to be sure, it was formerly held that if the name of the testator was written by himself in any part of the instrument, his final signature at the end might well be dispensed with<sup>3</sup> and it must ever be taken that writing one's own will affords the strongest proof of authenticity and a deliberate purpose; yet, whoever writes out the will, the same necessity exists generally at the present day, for a formal signature, and a specified number of subscribing witnesses.<sup>4</sup>

English Statute of Frauds, 29 Car. II, and insists that three (or at least two) witnesses shall subscribe, and that the will of real estate itself shall be in writing and signed by the testator. From this starting-point of a devise, legislation and practice tended to the requirement that wills of personal property should be in writing and similarly executed and attested; and at length the local law has reached a fairly uniform system. Wills must now be written and attested by either two or three witnesses, as the legislature may have preferred, but with the same number for both real and personal property. Yet there appear to be a very few States of this Union still, where wills of real estate must be executed and attested with formalities less indispensable for disposing of personalty. See *Hegarty's Appeal*, 75 Penn. St. 503; local statutes; 256, *post*; *Davis v. Davis*, 6 Lea, 543. When Chancellor Kent wrote his Commentaries, wills with a formal execution by the testator and witnesses were scarcely required in the United States except for devising real estate. 4 Kent Com. 505.

<sup>1</sup> This serves as a caution preliminary to discussing the formal requisites of a testament; and to add to the confusion of precedents we must observe further, that the testamentary law of continental Europe has influenced various States at the Southwest, and on the Pacific coast, first colonized by French and Spanish settlers,—Louisiana and California, for instance,—in favor of holographs and other peculiar modes of testamentary disposition with which the pure Anglo-Saxon stock was little familiar.

<sup>2</sup> As to the Scotch law favoring a holograph letter, when witnessed, see *Halford v. Halford* (1897), P. 36. And see *Whyte v. Pollock*, 7 App. Cas. 400.

<sup>3</sup> *Griffin v. Griffin*, 4 Ves. 197 n.; 9 Ves. 249; 3 Lev. 1; 2 Bl. Com. 501; *Gilb.* 260.

<sup>4</sup> But in some of the States holograph wills are expressly recognized, following usually the Louisiana civil code on this subject, but in some instances originating in our old English colonial law. The holograph will, under such statutes, dispenses with subscribing witnesses and the usual proof of a formal execution; but these codes require it to be entirely written, dated, and signed, by the testator's own hand. La. Civ. Code, arts. 1581, 1588; 46 La. Ann. 590. But cf. *Reagan v. Stanley*, 11 Lea, 316; *Myrick Prob.* (Cal.) 5. As to exact date, see 66 P. 96; *Gaines v. Lizardi*, 3 Woods C. Ct. 77. Expressing a legacy in figures is a sufficient writing out. 49 La. Ann. 107, 21 So. 191, 62 Am. St. Rep. 642. But cf. 48 La. Ann. 1088, 20 So. 281. A mere cap-

**255a. One's will is frequently drawn up by another under the testator's oral or written instructions.<sup>1</sup>**

**256. Other peculiar provisions as to the form, signature, and attestation of wills are found in our local codes.<sup>2</sup>**

tion "my will", etc., in another handwriting is immaterial. 36 So. 539, 83 Miss. 793. The testator's handwriting being proved, such a will becomes legally established. 13 S. & M. 406; 11 Humph. 377, 465; Davis v. Williams, 57 Miss. 843. If a printed form is filled up by the testator, this is not a holograph will. Rand's Estate, 61 Cal. 468, 44 Am. Rep. 555. See Richardson's Estate, 94 Cal. 63, 29 P. 484, where a letter of inquiry was held not testamentary. Formal subscription of the testator's name at the end of such a will is unnecessary, if the name is written elsewhere. 112 Cal. 513, 44 P. 1028. See as to a devise, Alston v. Davis, 118 N. C. 202. The Tennessee and North Carolina codes guard such a will with still greater caution in some respects; the writing must come from unsuspected custody for safe-keeping or be found among the testator's valuable papers, in order to be thus privileged. 11 Humph. 465; 91 N. C. 26; Bryan v. Barnard, 90 S. W. 858, 115 Tenn. 260, 112 Am. St. Rep. 822. The Arkansas statute requires a holograph will to be proved by three disinterested witnesses, swearing to their opinion, though no subscribing witness is needed. See also 34 Fed. 82; Stimson's Am. Stat. Law, § 2645. No such holographic will can bar a will in the ordinary form. See further, as to holograph wills and their due execution, 1 Gratt. 454, 42 Am. Dec. 564; Warwick v. Warwick, 86 Va. 596, 10 S. E. 843; 3 Jones (N. C.) 516; Toebe v. Williams, 80 Ky. 661; 83 Ky. 584; 80 Va. 293; Turell's Will, 59 N. E. 910, 166 N. Y. 330 (holograph wills not exceptional in solemnities of execution); Camp's Estate, 66 P. 227, 134 Cal. 233; Fay's Estate, 145 Cal. 82, 78 P. 340, 104 Am. St. Rep. 17 (as to date).

<sup>1</sup> Whenever in such a case, the language employed by the scrivener faithfully embodies the instructions and expresses the testator's intent, a variation from literal dictation is immaterial. See 46 La. Ann. 155, 1412, 15 So. 187, 16 So. 309, where a notary wrote out the will, under the code, at the dictation of the testator before witnesses. And even an honest mistake of expression by the scrivener may bind the estate disposed of, where the will afterwards became duly executed, as the testator was understood to intend it. Chilcott's Goods, (1897) P. 223; Collins v. Elstone, (1893) P. 1. Generally speaking, where neither fraud nor undue influence affects the transaction, one who prepares another's will may induce him to accept changes, whether in form or substance, so that the will as actually executed by a capable disposer, becomes by adoption his own will, and the mind of the scrivener is the mind of the testator himself. Cf. 245, 246; Sheer v. Sheer, 159 Ill. 591, 43 N. E. 334. But *aliter* as to a fraudulent or mistaken interpolation of which the testator knew nothing, Moore's Goods, (1892) P. 378.

<sup>2</sup> The Pennsylvania statute appears to have long dispensed with formal attestation, even in a devise of lands, provided the authenticity of the will can be proved by at least two competent witnesses. 1 Dall. 94; 1 Watts, 463. Proof of the testator's signature thus afforded is *prima facie* evidence of its execution though the will was not a holograph. Wiegel v. Wiegel, 5 Watts, 486. As to his holograph, see 131 Penn. St. 220, 6 L. R. A. 353, 17 Am. St. Rep. 798, 18 A. 1021; Tozer v. Jackson, 164 Penn. St. 373, 30 A. 400. See Wall v. Wall, 123 Penn. St. 545, 16 A. 598 (death before intended will was finished). And see 61 Md. 206.

In Tennessee, entries made in one's diary, which purport to dispose of the writer's property after his death, may constitute a holographic will. Reagan v. Stanley, 11 Lea, 316. Even although neither signed nor attested, these entries may be set up as a will of personalty, on sufficient proof of the handwriting. *Ib.* And see 100 Tenn. 193, 43 S. W. 768. A holograph will is not deprived of that peculiar character by the fact that there are witnesses to it. Roth's Succession, 31 La. Ann. 315. And see for the case of a holograph will established where an ineffectual attempt was made to formally execute a clean copy of it, Wilbourn v. Shell, 59 Miss. 205, 42 Am. Rep. 360. See 312, *post*.

Letters may constitute a holograph will. Dougherty v. Holscheider, 88 S. W. 1113 (Tex. 1905). In Skerrett's Estate, 67 Cal. 585, 8 Pac. Rep. 181, a letter addressed

257. Under modern statutes which require a will to be duly executed and attested by a certain number of subscribing witnesses, in order to give it effect, there can be no judicial evasion in favor of informal writings.<sup>1</sup> That which was intended as a will cannot legally take effect as such, unless executed with such formalities as public policy may have seen fit to impose.<sup>2</sup>

258. As to the requirement of writing, no compliance can be so natural and proper as the usual one, namely, the use of pen, ink, and paper. But if written in a printed or engraved blank, a will, like a deed, well satisfies the statute;<sup>3</sup> and so, too, even though the entire will were printed, lithographed, or engraved (a practice not so common, since every will must have its individual traits, and multiplied copies are useless), or prepared by the typewriter, hectograph, or any similar process.<sup>4</sup> But while one may write his will upon any material and in any mode, when forced by his situa-

to a sister, with a copy of a deed of gift—all in the brother's hand—was probated as a holographic will. And see 36 So. 1039, 84 Miss. 157. But cf. an ineffective writing in 50 La. Ann. 617, 23 So. 739. The dictation of a will while *in extremis* stands, moreover, under some local codes, upon an exceptional footing of favor. Signature of testator dispensed with only *in extremis* under Pennsylvania rule. 5 Whart. 386; 27 Penn. St. 485, 67 Am. Dec. 487; 75 Penn. St. 503. And see 3 Md. 134.

<sup>1</sup> Hence, if an instrument is in its true character testamentary, but has not been properly attested, the fact that the maker never revoked or repudiated it during his life gives it no validity for a probate. *Gough v. Findon*, 7 Ex. 48; 6 Ga. 575; 10 Yerg. 320; *Turner v. Scott*, 51 Penn. St. 126; *McCarty v. Waterman*, 84 Md. 550, 57 Am. St. Rep. 415, 36 A. 592. Nor can the paper thus intended to operate as a will be turned into a declaration of trust, so as to defeat the statute which prescribes how such wills shall be executed. *Long's Appeal*, 86 Penn. St. 196.

<sup>2</sup> Equity courts cannot supply the defective execution of a will. *Robson v. Jones*, 3 Del. Ch. 51.

Civil law formalities differ from those usual in England and America. See *Vogel v. Lehritter*, 139 N. Y. 223, 34 N. E. 914; *post*, 491. See also *Packer v. Packer*, 179 Penn. St. 580, 57 Am. St. Rep. 516, 36 A. 344; *supra* 11; 62 N. Y. S. 785; 76 Mo. 546.

<sup>3</sup> 9 Pick. 312; 4 Vt. 536; *Adams's Goods*, L. R. 2 P. & D. 367; *Dench v. Dench*, 2 P. D. 60; L. R. 3 P. & D. 159; 77 Ohio St. 704, 17 L. R. A. (N. S.) 353, 82 N. E. 1067 (statute).

<sup>4</sup> *Ib.* It is a rule of long standing, that where a statute requires writing it is satisfied by printing. *Schneider v. Norris*, 2 M. & S. 286

It is here to be observed that the policy of the law seeks materials and a mode of writing which shall sufficiently avoid the danger of fraudulent change or obliteration, and constitute for probate and public registry an instrument which shall express plainly and permanently on its face the testator's final language as to his disposition. As between ink and pencil, the former, or, at least, that substance whose marks cannot be erased without leaving a sure sign, is decidedly preferable; yet it is generally held that a will written or altered in lead-pencil instead of ink would be good. *Dyer, Re*, 1 Hagg. Eccl. 219; 1 Add. 406; 2 Phillim. 173; *Mence v. Mence*, 18 Ves. 348; *Bateman v. Pennington*, 3 Moore P. C. 223; 84 Penn. St. 510, 24 Am. Rep. 227; *Harris v. Pue*, 39 Md. 535; *Knox's Estate*, 131 Penn. St. 220, 17 Am. St. Rep. 798, 6 L. R. A. 353, 18 A. 1021. Doubtless, there are extreme cases where one has not in his haste the choice of materials; and if such extremity be shown, and the will proved a genuine one, signed and witnessed after the regular form, a court should not strain at fine objections.



tion to do so, a risk is incurred where the selection of materials, deliberately made, is an imprudent one and obnoxious to the legislative policy.<sup>1</sup>

259. **A testament may be written out in any language**, provided the testator himself understands essentially and intends what the will contains.<sup>2</sup> But with witnesses it seems proper, as with the testator himself, to consider what knowledge enables the particular duty to be intelligently performed.<sup>3</sup>

260. **A will should be legibly written**, in order to operate. But the aid of experts and those familiar with one's blind handwriting may be invoked for the purpose of making clear what the will contains.<sup>4</sup>

261. **Descriptions of the date or place of execution are not material** in any will unless the local statute expressly makes it so. Such formalities are certainly useful; but wills have been sustained as valid, though having no date or even a wrong one inserted.<sup>5</sup>

<sup>1</sup> Thus, it is held that anything so easily rubbed out or altered as a writing on a slate, contravenes the policy of the law and cannot be admitted as a will, though intended by the decedent as a last will and testament. *Reed v. Woodward*, 11 Phila. 541 (*aliter*, it would seem, in an extreme case of necessity). So, too, the use of a pencil or other materials undesirable for such solemn acts, may raise the question, whether the act was performed with a full and final testamentary intent or only as something incomplete and preliminary. One may make erasures and alterations with a lead-pencil on a will prepared in ink, and the instrument so corrected may pass to probate. *Fuguet's Will*, 11 Phila. 75; 1 Wms. Exrs. 111. But changes of this sort are never presumed to be deliberate and intended for a *bona fide* final correction, but rather the reverse; and in English probate practice the rule has long been established, to treat alterations made in lead-pencil as *prima facie* deliberative only, but alterations in ink as final and absolute. 1 Redf. Wills, 186; 1 Hagg. Ecc. 322, 490; 1 Add. 406; *Dickenson v. Dickenson*, 2 Phillim. 173; L. R. 2 P. & D. 256. Where a printed form is filled up partly in ink and partly in pencil, and the writing in ink makes sense with the form without help from the writing in pencil, the ink form is to be considered the true and final one. *Adams's Goods*, L. R. 2 P. & D. 367. See 33 Pa. Super. 570.

<sup>2</sup> 1 Wms. Exrs. 110; *Swinb.* pt. 4, § 25 pl. 3; *Green v. Skipworth*, 1 Phillim. 58; *Walter's Will*, 64 Wis. 487, 25 N. W. 538, 54 Am. Rep. 640. See *Reynolds v. Kortright*, 18 Beav. 417. Cf. *Miltenberger v. Miltenberger*, 78 Mo. 27; *Walter's Will*, 64 Wis. 487, 54 Am. Rep. 640, 25 N. W. 538; 107 N. W. 21, 128 Wis. 112 (duly translated to testator).

<sup>3</sup> A testator, even though ignorant of the language in which the will is expressed, should feel assured that the language used expresses his intention rightly; and where doubt is entertained on this point, the correctness and *bona fides* of the translation should be satisfactorily established in probate. As for witnesses, however, a knowledge of what the will contains is by no means indispensable; but such persons should at least know the nature of the act they are performing, and should sign no attestation clause, at all events, whose meaning is not clear to their minds. *Adams v. Norris*, 23 How. 366; *Breaux v. Gullusseaux*, 14 La. Ann. 233, 74 Am. Dec. 430.

<sup>4</sup> See 1 P. Wms. 421 (reference to a master in chancery). For interpreting a cipher, too, or words in an unknown tongue, a corresponding rule is useful. See Part VI, c. 3, *post*.

<sup>5</sup> 5 Ind. 389; 7 Gill & J. 311; 79 Ky. 607; 40 Ark. 144. Cf. 255, *supra*, as to holograph wills. With reference to its effect or even to its legality, the date may be of

262. A will may be valid and operative without such formal words as "will," "testament," "devise," or "bequest."<sup>1</sup> Informal expressions may here suffice.<sup>2</sup>

263. A "will" is something imperative on the whole, even though the testator should choose to employ some softer word to denote it. Doubtless his true intention, as the context may indicate, will operate in the details of the disposition; as in determining whether a party named in the will shall absolutely or at his own discretion perform a certain duty or appropriate a certain fund.<sup>3</sup> But as for the will, the testamentary disposition itself, its natural operation is absolute and imperative though never so gently expressed, and no one but the testator himself can make it.<sup>4</sup>

264. To discuss more generally the form of testamentary instruments. In jurisdictions which insist that wills shall be not only signed but attested by two or perhaps three witnesses, and in those, most of all, where a formal clause of attestation cannot be dispensed with, any uncertainty as to what writings shall or shall not be pronounced testamentary narrows its range. But while our law permitted any writing of a testamentary sort to rank as a will of personalty without attestation, without even the testator's signature subscribed to it, it must often have been a vexed problem to determine whether a certain writing found among one's papers after his death was or was not to all intents a will and an efficacious *post mortem* disposition of his property. And even at this day, under the numerous statutes which prescribe attestation but no formal clause of attestation, such questions sometimes occur.<sup>5</sup>

much consequence; but this may be established or corrected by parol evidence showing the real date of its execution. See 85 N. W. 109, 125 Mich. 647.

<sup>1</sup> Thus where a will began, "The request of C. I want R. to have my place as long as he shall live," etc., it was held a valid one. *Camp v. Stark*, 10 Phila. 528. And see *Miers v. Bedgood*, 9 Leigh, 361; *Wood Re*, 36 Cal. 75; *Mundy's Goods*, 2 S. & T. 119; *Robinson v. Brewster*, 140 Ill. 649, 33 Am. St. Rep. 265, 30 N. E. 683.

<sup>2</sup> *Coles's Goods* L. R. 2 P. & D 362 (past instead of future words of gift).

<sup>3</sup> *Wells v. Doane*, 3 Gray, 201; *Wynne v. Hawkins*, 1 Bro. C. C. 179. See *post*, 595, as to precatory trusts.

<sup>4</sup> *McRee v. Means*, 34 Ala 364; 3 Bradf. Sur. 101; 131 Penn. St 220, 17 Am. St. Rep. 798, 6 L. R. A. 353, 18 A. 1021; *Easton's Estate*, 188 Penn. St. 374, 68 Am. St. Rep. 374, 41 A. 529. But cf. *Smith's Goods*, L. R. 1 P. & D. 717, under 293 *post*.

<sup>5</sup> A paper amounting to little more than a mere draft or some simple order contained in a single sentence, may, if simply witnessed at the side of the drawer's signature by two persons or three (as the local statute prescribes), constitute a will. See 134 Mass. 426; *Cock v. Cooke*, L. R. 1 P. & D. 241; L. R. 2 P. & D. 362. A will need name no executor; it may avoid using such words as "last will and testament;" it may take effect as a partial, rather than a total disposition of property; there are no words or phrases essential to the devolution of title under such an instrument. *Byers v. Hoppe*, 61 Md. 206, 48 Am. Rep. 89; *Arendt v. Arendt*, 96 S. W. 982, 80 Ark. 204; 55 A. 963, 206 Penn. 260.

265. **No particular testamentary form** can be insisted upon, provided the maker of the instrument intended it to operate only at or after his death, and the instrument be executed with such formalities as local legislation may have imposed. Testamentary intention, in other words, or rather an intention whose effect is to create a testament, entitles the instrument to probate, however inartificial its form, subject only to such restraints as legislation may have seen fit to impose, for the better prevention of fraud and perjury.<sup>1</sup>

266. **The effect of such informal instrument being to give a posthumous destination** to the maker's property, any contrary title or designation which he may have given does not prevent the court from treating it as a will.<sup>2</sup> And, dispensing as it might with execution and a formal attestation in wills of chattels, our former probate law was led often to treating as a testament what was quite as likely from its face to be nothing more than some pre-

<sup>1</sup> *Masterman v. Maberly*, 2 Hagg. 248; *Lord Hardwicke* in 3 Atk. 163; *Leathers v. Greenacre*, 53 Me. 561; 1 McCord, 409; 14 Ga. 596; 2 Dougl. (Mich.) 515; 92 Wis. 209. 65 N. W. 1037. This doctrine until nearly 1850 applied chiefly in favor of wills of personality; to wills proper as contrasted with devises. And in much earlier times greater strictness prevailed in England than during the half century immediately preceding the enactment of 1 Vict. c. 26 (1837). 1 Wms. Exrs. 104.

There are numerous English decisions prior to 1838, chiefly those of the ecclesiastical courts, where various kinds of instruments have been sustained, as under the circumstances testamentary. As, for instance, a deed of gift. Or a deed, whether executed by way of deed-poll or indenture. Or a marriage settlement. Or general instruments expressed after the form of articles of agreement. Or a bond. Or a letter. Or a promissory note. Or a draft on a bank. Or the assignment of a bond or indorsement of a note to some party. Or a memorandum of testamentary intention. See 1 Jarm. Wills, 18-23 and cases cited.

Many American decisions, especially those not of recent date, are to the same effect. Thus, instruments which are in form a deed of gift, and so called, have been admitted to probate, out of regard to the giver's testamentary purpose. 2 Ala. 152; 13 Md. 1; 10 Ga. 506; *Johnson v. Yancey*, 20 Geo. 707, 65 Am. Dec. 646; 4 Hawks. 141; 2 Strobb. Eq. 348; *Millican v. Millican*, 24 Tex. 426. So with a deed. 4 Geo. 552; 28 Geo. 98, 73 Am. Dec. 751; 12 N. H. 371; 4 McCord, 198; 10 Yerg. 321, 31 Am. Dec. 583. Or letters. 1 Johns. Ch. 153; 53 Me. 561; 1 Gill & J. 25. 19 Am. Dec. 213; *Byers v. Hoppe*, 61 Md. 206, 48 Am. Rep. 89; *Cowley v. Knapp*, 42 N. J. L. 297. But as to a marriage settlement, see 12 Md. 158, 71 Am. Dec. 593, where probate was refused. Deeds, intended in essence to operate as such, are not allowed to operate as wills. 38 Miss. 197; *Rice (S. C.)* Ch. 243; 6 Md. 235; 3 Ga. 460; 5 Munf. 42; 22 Ala. 826; *Skerrett's Estate*, 67 Cal. 585, 8 P. 181. Nor is a bond of no testamentary purport. 3 Yeates, 389. Nor a paper of preliminary instructions. 4 Gratt. 277; 3 Md. 134. And various informal writings, letters, or memoranda, have been ruled out from probate, as not constituting wills. 2 W. & S. 145; 2 Harr. & J. 346. As for notes, orders, indorsements, etc., see 4 N. H. 434, 17 Am. Dec. 438; 6 Dana, 30; 4 S. & R. 545. And see 267-270, *post*.

<sup>2</sup> *Jarm. Wills*, 18; 1 Watts, 442; *Leathers v. Greenacre*, 53 Me. 561. As where words of immediate grant are expressed in the document and yet, on the whole, the intention was that of a future operation upon the signer's death. 2 Ves. Jr. 204; 23 Ala. 448; 13 Md. 1; 13 B. Mon. 299; 9 Rich. Eq. 111, 70 Am. Dec. 203.

liminary writing which embodied plans by no means matured at the disposer's death; thus confirming in no slight degree by laxity of construction that very uncertainty which the Statute of Frauds sought to remove from devises.<sup>1</sup>

267. Under our modern statutes requiring an attestation much of this former uncertainty as to wills, informal and inchoate, is obviated.<sup>2</sup>

268. In England and in the great majority of American jurisdictions, where formalities of signature and attestation must now be pursued, doubts may still arise whether a particular instrument ought or ought not to be probated as a will.<sup>3</sup>

<sup>1</sup> See 1 Redf. Wills, 168, and notes; 1 Jarm. Wills, 101-104, notes. Extrinsic parol evidence was here admitted; but as between presumptions and oral proof, informal papers intended as wills and inchoate or unfinished papers, it may be imagined through what a flood of uncertain litigation the English courts wandered until the statute of 1 Vict. c. 26 introduced a stricter necessity for formal execution.

There are numerous American decisions where wills of chattels have been admitted to probate upon similar grounds; no statute requirement being at the time transgressed. Thus in *Watts v. Public Administrator*, 4 Wend. 168; s. c., 1 Paige, 347 (a testamentary paper, found among the papers of the deceased in an iron chest, properly drawn up, as it appeared, by the testator, and with his name at the beginning, but nothing more to authenticate). See also 2 McCord, 520; 4 Gratt. 277; 4 Dev. L. 301; *supra*, 255 (holograph wills). And see more recently, *Orgain v. Irvine*, 100 Tenn. 193, 43 S. W. 768.

<sup>2</sup> Within the narrow sphere still assigned to nuncupative wills, parol evidence to authenticate writings, or to establish wills without any writing, of course avails. c. 4, *post*. And we are further to remember that in a few of the United States a formal attestation by witnesses is not made indispensable to probate; while in various parts of this country holograph wills appear to have found a permanent lodgment; not, however, without more wholesome precautions against error and fraud than formerly. *Supra*, 255, 256.

Under the Maryland code this was held a valid testament of personal property which the decedent wrote and signed on the back of a business letter and addressed to A.: "After my death you are to have forty thousand dollars; this you are to have, will or no will; take care of this until my death." *Byers v. Hoppe*, 61 Md 206, 48 Am. Rep. 89. And see 60 Md. 440. In Pennsylvania, too, where subscribing witnesses may be dispensed with, under the peculiar policy of its code, various informal papers are sustained, as testamentary, by the later decisions. See 31 Penn. St. 25. Thus, an instrument after the form of an assignment of a life insurance policy, "to my wife M. after my death, when she can do with it according to her best will, without partiality toward her children." *Schad's Appeal*, 88 Penn. St. 111. And the indorsement of address on a sealed envelope has been taken, together with its contents, consisting of a promissory note and an unaddressed letter, as constituting together a valid testamentary disposition of the note in favor of the party named on the envelope. *Fosselman v. Elder*, 98 Penn. St. 159. A paper in the form of a power of attorney may be admitted on due proof as testamentary. 30 Penn. St. 225. And see as to a holograph writing in lead-pencil on the back of a printed notice, 188 Penn. St. 374, 68 Am. St. Rep. 874, 41 A. 529. See also *Barton's Estate*, 52 Cal. 537; 36 Cal. 75.

<sup>3</sup> This is because the law still permits the greatest flexibility of form and expression in documents whose aim is a posthumous disposition of property; and, while requiring a certain number of subscribing witnesses, moreover, leaves the form of attestation itself quite at discretion; for should a statute make it imperative for witnesses to sign an attestation clause as such clauses are usually written (namely, that the testator in their presence signs and declares the instrument as his will),

little controversy would remain, though doubtless many intended wills would fail of operation in consequence.

Thus, to suppose a written instrument drawn up somewhat like a deed or a solemn contract; or some writing in the form of a letter, a draft on a bank, or a memorandum. It is signed by the party since deceased; two or three witnesses, the full statute number, have attested by writing their names at the side, as is often done in a deed or indenture. Is that instrument a will or not? It complies with most local statutes of wills in all essentials; and yet no layman who reads it over could confidently pronounce it a will, more than a deed or some other kind of writing whose form it follows. Decisions that one might suppose at variance pursue the line of distinction appropriate in such cases.

There are numerous late American cases, for instance, which consider instruments drawn up and attested after the form of a conveyance. One in Georgia reserved specific land to the maker's use during his life, and provided how all his property should go at his death, after his burial expenses and debts were paid. The maker of this instrument kept it while he lived, and the court held it was a will. *Nichols v. Chandler*, 55 Ga. 369. A few years later the same court passed upon another instrument, likewise drawn up like a deed, which also reserved to the maker the use of the land for life, and pronounced it no will at all, but a deed of gift under reservations. *Williams v. Tolbert*, 66 Ga. 127. And see 41 Ga. 212; 66 Ga. 317; 6 Ga. 515; 51 Ga. 239; 90 Ga. 650, 16 S. E. 938; 48 S. E. 129, 120 Ga. 582; *Sharpe v. Mathews*, 51 S. E. 706, 123 Ga. 794. Like distinctions have been drawn in other States, where instruments made out in the form of a deed, but well executed for either deed or will, convey a specified tract of land, or, as the case may be, all of the maker's estate real and personal, or his personalty only. *Wilenou v. Handlon*, 69 N. E. 892, 207 Ill. 104; *Gomez v. Higgins*, 30 So. 417, 130 Ala. 492; *Murphy v. Gabbert*, 66 S. W. 536, 166 Mo. 596; *Ellis v. Plason*, 58 S. W. 318, 104 Tenn. 591; 58 S. W. 550. See *Kelly v. Richardson*, 100 Ala. 584, 13 So. 785 (instrument as a codicil). For among those devoted to agriculture it is not unusual to purpose a sort of conveyance of the farm or its stock in contemplation of death, with a proviso for the maker's support during the rest of his life, and a suspension of the gift to make that support sure. See among cases favoring as wills, 68 Mo. 584; 4 Baxt. 357; *Freed v. Clarke*, 80 Penn. St. 171; 65 Ala. 301; 52 Ala. 430; 59 Ala. 349; *Crocker v. Smith*, 94 Ala. 295, 10 So. 258; *Stevenson v. Huddleson*, 13 B. Mon. 299; 52 Penn. St. 338, 91 Am. Dec. 159; *Lautenschlager, Re*, 80 Mich. 285.

A deed given in escrow to be operative after death is revocable by a will of the grantor. *Leonard v. Leonard*, 108 N. W. 985, 145 Mich. 563. Cf. 109 N. W. 886, 132 Iowa, 442. And so wherever the ambulatory character remains in the grantor. *Megary's Estate*, 55 A. 963, 206 Penn. 260. Cf. *Griffin v. McIntosh*, 75 S. W. 677, 176 Mo. 392; *Johnson v. Johnson*, 54 A. 378, 24 R. I. 571; 69 N. Y. S. 163.

But there are adverse decisions which affect one's property *in futuro*. 10 Lea, 73; 97 Penn. St. 313. Nor can instruments having the essential characteristics of deeds or contracts be construed into writings testamentary. As in the case of an absolute deed of trust with reservation of a life interest in the grantor. Or a deed passing title *in present* with possession postponed until grantor's death. *Griswold v. Griswold*, 148 Ala. 239, 42 So. 554; *Oswald v. Caldwell*, 80 N. E. 131, 225 Ill. 224; *Peritico v. Hays*, 75 Kan. 76, 88 P. 738; 149 Cal. 143, 84 P. 839; *Heaston v. Kreig*, 167 Ind. 101, 77 N. E. 805; *Day v. Meadows*, 92 S. W. 637, 194 Mo. 508; *Beaumont's Estate*, 63 A. 1023, 214 Penn. 445; 85 S. W. 244 (Ark. 1905); 70 N. E. 289, 208 Ill. 304 (several such deeds executed together); *Adair v. Craig*, 33 So. 902, 135 Ala. 332 (no power to defeat title reserved); *Robinson v. Ingram*, 35 S. E. 612, 126 N. C. 327; *Love v. Blauw*, 59 P. 1059, 61 Kan. 496, 78 Am. St. Rep. 432, 48 L. R. A. 257. Nor is a mortgage back of property for interest during life, principal after death, to remain to mortgagor and his heirs testamentary. *Fiscus v. Wilson*, 74 Neb. 444, 104 N. W. 856. And see *Hinkle v. Landis*, 131 Penn. St. 573, 18 A. 941 (a bond transaction); *Ogle's Estate*, 97 Wis. 56, 72 N. W. 389 (a lease transaction); 6 Md. 235 (deed confirming a previous will); 21 Tex. 790.

A testament ought to be admitted to probate, though brief and informal in expression. 17 Hun. (N. Y.), 72; 24 Ga. 640, 71 Am. Dec. 147; 31 Penn. St. 25. And see 86 N. W. 960, 130 Mich. 300. Orders on savings banks, duly executed, have been upheld as testamentary upon slight phraseology to that effect; and so with promis-

269. **There are late English cases which present similar points of inquiry**, under the operation of the Wills Act of 1837.<sup>1</sup>

270. **One instrument may be partly a will and partly a deed or contract**; partly for present and partly for posthumous purposes.<sup>2</sup> For notwithstanding certain provisions contained in a testamentary paper are intended to operate as a contract *inter vivos*, the instrument is none the less a will in regard to its other provisions.<sup>3</sup>

271. **An intended gift of some chattel, which latter involves a delivery**, should be distinguished from a will. For a testament, invalid for want of proper attestation, cannot be sustained as a gift *causa mortis*, nor as an immediate assignment, nor as a gift *inter vivos*.<sup>4</sup>

sory notes having a like *post mortem* effect. 134 Mass. 426; *Cover v. Stem*, 67 Md. 449, 1 Am. St. Rep. 406, 10 A. 231; *Sunday's Estate*, 167 Penn. St. 30, 31 A. 353, and cases cited; *McCourt v. Peppard*, 105 N. W. 809, 126 Wis. 326. But cf. *De Martini v. Allegetti*, 79 P. 871, 146 Cal. 214; 102 N. W. 163, 13 N. D. 574; 92 N. Y. S. 578; *Main's Appeal*, 48 A. 965, 73 Conn. 638 (savings bank deposit).

We may regard it as the settled doctrine of most American States, that a will must be perfect in the testamentary sense, and designed as something final in shape, and not preliminary, or it cannot take effect as a will; and this, in conformity to our American policy, which prescribes certain formalities of execution as indispensable, including a due attestation by witnesses. Mere drafts or minutes of wills are therefore inadmissible to probate. 3 Bradf. Sur. 16; *Rooff's Appeal*, 26 Penn. St. 219; 9 Penn. St. 54; *Lungren v. Swartzwelder*, 44 Md. 482; *Hart v. Rust*, 46 Tex. 556. But some of our earlier decisions, made under statutes less explicit, and possibly later ones, too, in States whose legislation still favors holograph wills, and otherwise departs from the general policy, appear to conform to a laxer principle. 266. A paper drawn up as a memorandum of instructions and then duly executed and attested as a will, would of course operate in its final character because of a corresponding change of purpose which the testator had properly carried out.

<sup>1</sup> *Cock v. Cooke*, L. R. 1 P. & D. (informal paper duly executed); 2 Rob. 288; *Coles, Re*, L. R. 2 P. & D. 362; L. R. 2 P. & D. 43; 1 S. & T. 542; *Morgan's Goods*, L. R. 1 P. & D. 214; *Milnes v. Foden*, 15 P. D. 105 (revocable deeds poll held testamentary); *Coles's Goods*, 9 L. R. 2 P. & D. 362 (words of gift not in future, yet intent posthumous); *Slinn's Goods*, 15 P. D. 156.

<sup>2</sup> *Doe v. Cross*, 8 Q. B. 714; *Barker's Goods*, P. 251 (1891). (A power of attorney with posthumous provisions added where one goes on a journey); *Devecmon v. Devecmon*, 43 Md. 335; *Reed v. Hazleton*, 37 Kan. 321, 15 P. 177; 6 Ga. 515; *Stewart v. Stewart*, 59 N. E. 116, 177 Mass. 493.

<sup>3</sup> *Taylor v. Kelly*, 31 Ala. 59, 68 Am. Dec. 150. But, on the other hand, an instrument intended as a deed or contract *inter vivos* cannot be treated as a will, even though worthless and inoperative (as, for instance, for want of delivery) in the other sense 2 Strobh. Eq. 34; *Edwards v. Smith*, 35 Miss. 197; *Skerrett's Estate*, 67 Cal. 585, 8 Pac. Rep. 181.

<sup>4</sup> *Basket v. Hassell*, 108 U. S. 267, 27 L. Ed. 719; 2 Schoul. Pers. Prop. §§ 135-198. As to checks, promissory notes, etc., passed over by way of gifts *causa mortis* without indorsement, see 27 Beav. 303; *Clement v. Cheesman*, 27 Ch. D. 631; 2 Sch. Pers. Prop. §§ 167, 197. See formal will set up against an unexecuted disposition by way of gift, 190 Penn. St. 382. As to previous delivery with other intention, see *Cain v. Moon*, (1896) 2 Q. B. 283.

It is a curious circumstance that while our modern statutes tend to restrain or abolish the making of nuncupative or oral wills, they freely permit gifts *causa mortis*, which are of essentially the same character and equally liable to objection.

272. Now, to consider the true test or tests in a doubtful case, as to whether the particular writing be really a will or some other instrument. It is the *animus testandi* in general which makes any instrument a will, or *vice versa*.<sup>1</sup> In short, to determine the true character of a doubtful instrument we must read the intention of the maker by the light of the transaction itself, as shown by the provisions of the instrument and all the surrounding circumstances. If the intention be to convey in effect a present estate or interest upon the execution of the instrument; by which is meant, not necessarily a present vested interest and enjoyment in possession, since any grantor might reserve to himself or create for another's benefit a life estate, with all use and occupation, rents or profits, by way of precedence; the instrument is a deed and not a will.<sup>2</sup> But to be a will the estate must accrue and take effect only after the maker's death; and if such be the operation, the instrument is not a deed.<sup>3</sup>

273. The form of the instrument in controversy will usually determine its true character.<sup>4</sup> But collateral evidence has been

<sup>1</sup> *McCloskey v. Tierney*, 74 P. 699, 141 Cal. 101, 99 Am. St. Rep. 33; 77 P. 71, 143 Cal. 528; *Smith v. Holden*, 58 Kan. 535, 50 P. 447. In general, delivery accompanies a gift, so as to vest title in another. Voluntary conveyance to A., which is placed in the hands of a third person to be delivered after the grantor's death, is not testamentary but a gift, if all control to alter is parted with, even though grantor retains the property for life. *Bogan v. Swearingen*, 65 N. E. 426, 199 Ill. 454; *Christ v. Kuehne*, 72 S. W. 537, 172 Mo. 118; *Coulter v. Shelmadine*, 53 A. 638, 204 Penn. 120; *Smith v. Baxter*, 53 A. 1125, 68 N. J. L. 414.

See *Beatty v. Western College*, 177 Ill. 280, 69 Am. St. Rep. 242, 42 L. R. A. 797, 52 N. E. 432, and cases cited (a promissory note, to become due on the maker's death).

It is laid down in some cases that an instrument cannot be allowed as a will if, at the time of execution, the deceased did not intend to make his will, nor know that he was making it. 1 Mass. 258, 2 Am. Dec. 16; 3 N. J. Eq. 625. This statement proves usually accurate; but in practice, and aside from legislation which requires one to declare it his will before witnesses, the criterion does not always serve. To take, for instance, that class of cases where the farmer makes a conveyance of his land in form, but with the idea of securing his sure support out of the property until death; here it is often hard to discover whether, technically speaking, the disposition was testamentary or not; and in all probability the disposer himself had no clear opinion on that point. But the transaction itself is seen to be testamentary in character, or the reverse; and as this is the transaction the maker intended, his instrument is declared a will or a deed accordingly. *Supra*, 268. Even though he could be shown to have intended it as a will and attested it as such, this would not avail as against the actual transaction; and so *vice versa*. See *Patterson v. English*, 71 Penn. St. 454; *Buller, J.*, in 2 Ves. Jr. 231. It is perhaps enough to say, that if the maker intended a disposition which was in legal effect testamentary, that disposition will stand as testamentary.

<sup>2</sup> *Cates v. Cates*, 135 Ind. 272, 34 N. E. 957, and cases cited; *Johnson v. Johnson*, 54 A. 378, 24 R. I. 571. See 202 Mo. 565, 101 S. W. 42 (statute).

<sup>3</sup> 2 Ves. Jr. 231; *Williams v. Tolbert*, 66 Ga. 127; *Morgan's Goods*, L. R. 1 P. & D. 214; *Reed v. Hazleton*, 37 Kan. 321, 15 P. 177. No paper can be deemed testamentary and entitled to probate as a will unless the benefit it confers is postponed to the death of the party who confers it.

<sup>4</sup> In *Ferguson-Davie v. Ferguson-Davie*, 15 P. D. 109, an instrument positively stating that it was not a will was refused probate, although suitably witnessed. Cf.

freely admitted where the instrument itself is silent or equivocal, in order to show whether or not a testamentary disposition was actually intended.<sup>1</sup>

274. **The ambulatory or revocable character** should here accompany the posthumous taking effect in order to conclude the instrument as testamentary.<sup>2</sup>

275. **If all legal formalities have been actually complied with the instrument which one executes as his will** should operate notwithstanding his mistaken belief that other formalities were requisite.<sup>3</sup>

276. **In modern practice an instrument which was meant to operate as a settlement, or a deed of gift, or a bond, but which proves invalid in that respect, cannot take effect as a will.**<sup>4</sup>

277. **Extrinsic evidence is not admissible to dispute the plain tenor of an instrument as testamentary or otherwise; but only where something to suggest a doubt as to whether the instrument was intended to be testamentary or not appears on the face of it.**<sup>5</sup>

277a. **It is obvious that a writing of doubtful character such as we have considered must fail of enforcement altogether if pro-**

in a doubtful case, 2 Hagg. 428; 3 Hagg. 218; 4 Hagg. 359. And see *Miller v. Holt*, 68 Mo. 584; 4 Baxt. 357.

<sup>1</sup> 2 Robert. 292; 3 Sw. & Tr. 586; L. R. 1 P. & D. 241; *Robertson v. Smith*, L. R. 2 P. & D. 43; Walk. 520; 12 N. H. 371; *Sharp v. Hall*, 86 Ala. 110, 11 Am. St. Rep. 23, 5 So. 497; 105 N. W. 1110, 42 Mich. 589. See 277, *post*. And notwithstanding the use of technical words and expressions, which might lead to a different conclusion, the paper will be pronounced what, upon the whole, the true scope and bearing of its contents entitle it to be considered. 1 Jarm. Wills, 18; 19 Ala. 59; 2 Desaus. 92; *Armstrong v. Armstrong*, 4 Baxt. 357; *Rawlins v. McRoberts*, 95 Ky. 346, 25 S. W. 601. The presumption that all was done rightly may here apply, even though the attesting witnesses have no precise recollection of the circumstances of the execution. *Colyer's Goods*, 14 P. D. 48.

<sup>2</sup> In general, an instrument which purports to be a last will, and disposes not of present property but of that which the maker shall at his death be seized or possessed, is ineffectual in any other sense than as a will, and must be duly executed with whatever formalities the statute may have imposed. *Poore v. Poore*, 55 Kan. 687, 41 P. 973; *Conrad v. Douglas*, 59 Minn. 498, 61 N. W. 673. On the other hand, where a conveyance or instrument of transfer of one's property is made without power to revoke, there is no will. 68 S. W. 411, 24 Ky. Law, 262; 41 S. E. 602, 115 Ga. 277; cases, 268, *supra*. And see *Meck's Appeal*, 97 Penn. St. 213; *Miller v. Holt*, 68 Mo. 584. The idea that the maker intended a will and not a transfer *inter vivos*, is strengthened by the circumstance that he kept the doubtful instrument under his own control, thus suspending delivery until his death and making it easy to revoke the disposition. See *Nichols v. Chandler*, 55 Ga. 369.

<sup>3</sup> *Fisher's Goods*, 20 L. T. 684; *Toebbe v. Williams*, 80 Ky. 661; *Beebe, Re*, 6 Dem. 43.

<sup>4</sup> *Edwards v. Smith*, 35 Miss. 197; 15 P. D. 109; L. R. 1 P. & D. 214. But the earlier judicial disposition was lax in that respect. See 1 Wms. Exrs. 106; 2 Hagg. 247. And see *Kelleher v. Kernan*, 60 Md. 440.

<sup>5</sup> *Whyte v. Pollok*, 7 App. Cas. 400; 3 S. & T. 586; 2 Beasl. 458; *Sunday's Estate*, 167 Penn. St. 30; 6 Houst. 569; *Sewell v. Shingluff*, 57 Md. 537; 190 Penn. St. 476, 42 A. 886. Cf. 273, *supra*. And see *Kelly v. Shimer*, 152 Ind. 290, 53 N. E. 233. The court should apply sound principles of construction to arrive at the real character of the instrument.



nounced a will, unless executed with all the local statute formalities which a testament requires.<sup>1</sup>

278. Wills require the genuine *animus testandi* to the extent, at least, of intending a disposition whose legal effect the court may safely pronounce testamentary. The mind should act freely and understandingly to this intent; and hence it may be shown in evidence to vitiate an alleged will, not only that it was the offspring of an unsound mind, of essential error, fraud or coercion, but that it was written in jest, or without any idea of making an operative will.<sup>2</sup>

279. A regular paper regularly executed speaks for itself, and the *animus testandi* is naturally inferred.<sup>3</sup> But papers which are not clearly on their face of a testamentary character, even though signed and attested, require to have the *animus testandi* shown to the satisfaction of the court.<sup>4</sup>

280. That the last will of a testator be expressed in a single instrument is not essential.<sup>5</sup>

281. Moreover, if a testator refers in his will to another paper which has already been written out, clearly and distinctly identifying and describing it, so that it may safely be incorporated in so solemn a disposition, that paper should be probated as part of the will itself. In general, such an extraneous unattested writing, to be incorporated with the will, should be reasonably identified by reference as part of it and as existing when the will was executed.<sup>6</sup>

<sup>1</sup> Cover v. Stem, 67 Md. 449, 1 Am. St. Rep. 406, 10 A. 231; Comer v. Comer, 120 Ill. 421, 11 N. E. 848; 80 N. E. 131, 225 Ill. 224; McKennon v. McKennon, 46 Fed. 713 (co-partnership articles); Griffin v. McIntosh, 75 S. W. 677, 176 Mo. 392 (deed in form).

<sup>2</sup> 216, *supra*; Lister v. Smith, 3 Sw. & Tr. 282; 1 Mass. 258, 2 Am. Dec. 16; Fleming v. Morrison, 72 N. E. 499, 187 Mass. 120, 105 Am. St. Rep. 386 (a "fake" will).

<sup>3</sup> See Sewell v. Slingsluff, 57 Md. 537, 547.

<sup>4</sup> 2 Sw. & Tr. 479; Whyte v. Pollok, 7 App. Cas. 400.

<sup>5</sup> The instance of a will with several codicils is a familiar one in point. And there may be several papers of different natures and forms, constituting a will when taken together; wills, for instance, which dispose separately of property foreign and domestic; not, however, in these times unless the local statute prescribing a formal signature and attestation be duly complied with. 1 Wms. Exrs. 107; Morgan's Goods, L. R. 1 P. & D. 323; (1893) P. 254; 36 Col. 467, 85 P. 84; Phelps v. Robbins, 40 Conn. 250; 15 Penn. St. 281, 53 Am. Dec. 597; 1 Tuck. Sur. 205; 1 Bradf. Sur. 114; 8 App. D. C. 452. As to two holographic instruments constituting one will, see Murphy's Estate, 104 Cal. 554, 38 P. 543; 63 S. W. 937 (Tex. 1901).

A former will absolutely and fully revoked by a later one ought to constitute no part of the probate; but such reference in the latter to the former will as makes it only *pro tanto* a revocation, entitles the two papers to probate as containing together the last will. See Part IV, *post*.

<sup>6</sup> Singleton v. Tomlinson, 3 App. Cas. 404; L. R. 1 P. & D. 106; Bizzey v. Flight, 3 Ch. D. 269; (1893) P. 254; Lucas v. Brooks, 18 Wall. 436, 21 L. Ed. 779; Newton v. Seaman's Friend Society, 130 Mass. 91, 39 Am. Rep. 433; 15 Hun. 410; Willey's Estate, 60 P. 47, 128 Cal. 1; Schilling v. Bawlek, 112 N. W. 110, 10 Iowa, 1907;

As to a paper not actually in existence, but hereafter to be prepared and executed, no reference in the existing will can give it any valid testamentary effect, independently of its own proper execution as a will in conformity with the statute.<sup>1</sup>

281. **Parol evidence to identify the reference made in a duly executed will as to other attested or unattested papers already existing, so as to incorporate all together in the probate, is admissible in case of doubt.**<sup>2</sup> But, while parol evidence may thus identify it should not be admitted to contradict the reference thus made in the former will, nor to incorporate where no incorporating reference is made at all.<sup>3</sup>

283. **Where one's will refers to a memorandum which cannot be found upon his decease, the will may take effect without it; either**

*Baker's Appeal*, 107 Penn. St. 381, 52 Am. Rep. 478; 2 Gratt. 439; 3 B. Mon. 390; *Brown v. Clark*, 77 N. Y. 369; 3 Rich. Eq. 305; 14 Mo. 587, 55 Am. Dec. 120; *Chambers v. McDaniel*, 6 Ired. 226; 117 Penn. St. 238, 2 Am. St. Rep. 660, 14 A. 816.

But to incorporate a document in the probate of a will, three things are necessary: (1) that the will should refer to the document as then in existence; (2) proof that the document propounded was in fact written before the will was made; and (3) proof of the identity of such document with that referred to in the will. See *Garnett's Goods*, (1894) P. 90; (1932) P. 238. Where the extraneous paper is in other hands, or appears a mere letter of instruction, the court discriminates according to the circumstances. See *L. R. 1 P. & D. 106*; *Jordan v. Jordan*, 65 Ala. 301; 60 A. 266, 77 Conn. 604, 107 Am. St. Rep. 64.

<sup>1</sup> Hence, the testator cannot reserve a power to dispose of property at a future time by what is tantamount to a will informally executed. 16 N. Y. 9; 9 Allen, 283; 3 Curt. 468; 5 Penn. St. 441, 47 Am. Dec. 418. Nor to select a legatee under some subsequent writing. *Dennis v. Holsapple*, 148 Ind. 297, 300, 62 Am. St. Rep. 526, 46 L. R. A. 168, 47 N. E. 631. Indeed, the written reference in the will to a paper as something to be afterwards prepared, sufficiently debars that paper from being legally incorporated with it. *Sunderland, Re*, L. R. 1 P. & D. 198. And see *Durham v. Northen*, (1895) P. 66.

In some of our States, the courts are very reluctant to admit as wills any extraneous unattested paper whose purport is to dispose, and not merely to explain, describe, or arrange the details under the formal instrument. *Phelps v. Robbins*, 40 Conn. 250; *Thompson v. Quimby*, 2 Bradf. 449; *Bryan v. Bigelow*, 60 A. 266, 77 Conn. 604, 107 Am. St. Rep. 64. A testator cannot be too scrupulous about having his will in final and complete shape before the execution takes place, and avoiding all amendments and additions afterwards without the full solemnities. See 6 Dem. 262 (carelessly appending such papers without due reference in the will).

<sup>2</sup> *Allen v. Maddock*, 11 Moore P. C. 427, 461; 1 Wms. Exrs. 100. And see *Daniels's Goods*, 8 P. D. 14; (1895) P. 66; 163 Ill. 144, 36 L. R. A. 112, 45 N. E. 211.

<sup>3</sup> *Sunderland, Re*, L. R. 1 P. & D. 198; *Watkins's Goods*, L. R. 1 P. & D. 19; L. R. 1 P. & D. 198. Reference to another paper might be made in a will without the incorporating intent at all. See *Myrick*, 205. And see 3 S. & T. 175; *Dennis v. Holsapple*, 148 Ind. 297, 62 Am. St. Rep. 526, 46 L. R. A. 168, 47 N. E. 631. In general, the burden of establishing the existence and identity of an extraneous paper as part of the will rests upon the party who seeks to get such paper admitted. *Singleton v. Tomlinson*, 3 App. Cas. 404. See (1897) P. 261 (a bulky pamphlet made part of a will).

An insufficiently executed testament, or any other extraneous paper, made subsequent to the execution of the will, may by a later instrument which is properly executed and refers to it become part of the latter and with it form a valid new will or codicil. *Shaw v. Camp*, 163 Ill. 144, 36 L. R. A. 112, 45 N. E. 211; *Skinner v. Bible Society*, 92 Wis. 209, 65 N. W. 1037; *Heath's Goods*, (1892) P. 253.

on the presumption that the testator destroyed it with the intention of revoking, or because an apparent testamentary disposition is not to be disappointed because other dispositions are unknown by reason of a lost paper.<sup>1</sup>

284. **A will may be written on several sheets of paper incorporated together in sense as one instrument.**<sup>2</sup> And, unless the local statute provides differently, the will is well signed and attested on the last sheet alone, provided the execution was *bona fide* and meant to cover the whole.<sup>3</sup>

285. **Wills may be conditional, that is to say, made intentionally dependent upon the happening of some specified contingency for testamentary operation.** If the condition is of partial application simply, the will should be admitted to probate, and the effect of the condition upon a particular devise or legacy treated as matter of construction afterwards. But if the condition is one that strikes into the essence of the whole will, affecting its status for probate and a valid operation, the main point to determine is, whether so sweeping an effect was really intended.<sup>4</sup>

286. **There seems no reason upon principle why an instrument cannot be made which shall take effect as a will, on the happening of a particular contingency named in it; not the usual simple contingency of the testator's death, but his death after a certain manner, or at or before a particular date, or during some special season of risk, or in case he shall or shall not leave such an estate or such persons surviving him.** But how rarely is it to be supposed that a testator means that the will which he leaves at his death uncanceled was only meant to operate if he died at some particular time or by some stated mode; while for conditions which have the

<sup>1</sup> *Dickinson v. Stidolph*, 11 C. B. N. S. 341; *Wood v. Sawyer*, Phill. (N. C.) 251. But the presumption of intended revocation and destruction by the testator being overcome, secondary proof of contents may, we apprehend, be supplied. See as to proof of a lost or missing will, etc., Greig, *Re*, L. R. 1 P. & D. 72; *post*, Executors, 84.

<sup>2</sup> The different parts of a will need not be physically connected, provided they are connected by their internal sense or by a coherence and adaptation of parts. *Wickoff's Appeal*, 15 Penn. St. 281, 53 Am. Dec. 597; 68 N. Y. S. 632.

<sup>3</sup> See 3 Burr. 1773; *Marsh v. Marsh*, 1 Sw. & Tr. 528; *Jones v. Habersham*, 63 Ga. 146; *Barnewell v. Murrell*, 108 Ala. 366, 18 So. 831, chapters 2 & 3 *post*.

The presumption is that papers bound or fastened together, coherent in sense, and constituting the will as found after the testator's death, were so bound or fastened and constituted the will when it was executed and attested. *Rees v. Rees*, L. R. 3 P. & D. 84 (an important illustration); *Palmer v. Owen*, 229 Ill. 115, 82 N. E. 275; 112 Mo. 210, 20 S. W. 456.

<sup>4</sup> For one may state a contingency that he has in mind as the inducement for making his will, by way of narrative, so to speak, or he may, on the contrary, state it as the condition on which the will is to become operative. The question is, which he intended. See *Hoar, J.*, in *Damon v. Damon*, 8 Allen 192; 2 Bradf. Sur. 204.

amount of estate or the survivorship of certain other persons in view, how natural is it that these should have been embraced within the scope of disposition under a will which of itself disposes.

287. In England extrinsic evidence as to the testator's actual intention and his adherence to the will despite the condition is less easily applied under statute 1 Vict. c. 26 (1837), than formerly; the court confining its attention rather to the language used in a written instrument executed with due solemnities.<sup>1</sup>

288. American cases incline, on the whole, to admit to probate wills which, if rigidly interpreted, might be thought conditional or contingent.<sup>2</sup>

289. On the other hand, several American cases have treated a will of dubious phrase as contingent or conditional.<sup>3</sup>

290. This doctrine of conditional or contingent wills is, on the whole, so rarely invoked, that the bearing of extrinsic evidence in such cases has not been fully unfolded in the decisions. Where a

<sup>1</sup> Hence, a will expressed to take effect if the testator should die on a stated voyage, or before his return from a particular journey, has been held inoperative; the testator having returned in safety, and died long after under circumstances quite different, so that the contingency stated in the will never happened. *Winn's Goods*, 2 Sw. & Tr. 147; 2 Sw. & Tr. 337. Cf. among earlier English cases, *Parsons v. Lanoe*, 1 Ves. Sen. 190; s. c. *Ambl.* 557; 1 Wms. Exrs. 189. For now, as not formerly, a strict republication would be indispensable where a will once became inoperative, in order to reinstate it, and not merely a parol recognition.

But where a will, written as though conditional upon a long journey, is re-executed and duly witnessed after the testator's safe return, the condition ceases, and the will may fully operate by remaining uncanceled; and such, too, is the practical consequence where the instrument was properly executed for the first time when the journey was over. *Cawthorn's Goods*, 3 Sw. & Tr. 417. The due execution of a new and inconsistent will, however, would supersede any such contingent will. See 4 Hagg. 179. For latest English cases, see *Dobson's Goods*, L. R. 1 P. & D. 88 (limit in point of time); *Porter's Goods*, L. R. 2 P. & D. 22; L. R. 1 P. & D. 380; *Halford v. Halford*, (1897) P. 36; *Spratt's Goods*, (1897) P. 28.

<sup>2</sup> It is generally found that wills of this character employ language careless and inartificial, and that they are not prepared under competent professional guidance. All the more, then, should courts incline against giving to an expressed peril the full force of a condition, in case of legal doubt. See *Damon v. Damon*, 8 Allen, 192; *Lindsay Ex parte*, 2 Bradf. Sur. 204; *French v. French*, 14 W. Va. 458 and cases cited; *Kelleher v. Kernan*, 60 Md. 440; *Barton's Estate*, 52 Cal. 538; 62 N. E. 275 (Ind. 1901); *Eaton v. Brown*, 24 S. Ct. 487, 193 U. S. 411, 48 L. Ed. 730; *Redhead's Estate*, 35 So. 161 (Miss. 1904); 88 S. W. 1113 (Tex. 1905); *Forgnier's Estate*, 216 Penn. 331.

<sup>3</sup> Thus, in Kentucky, where a will devised real estate after this form: "As I intend starting in a few days to the State of Missouri, and should anything happen that I should not return alive, my wish is," etc. *Dougherty v. Dougherty*, 4 Met. (Ky.) 25. And in Missouri, where, very curiously, a will couched in nearly the same language, began: "I start this day for Kentucky," etc. *Robnett v. Ashlock*, 49 Mo. 171. In each instance, the testator was fortunate enough to go to and fro between these two States alive, and his will failed in consequence. See further, *Morrow's Appeal*, 116 Penn. St. 440, 2 Am. St. Rep. 616 (ill on journey and brought back, dying a few days later); 20 App. D. C. 453.

statute mode of execution or re-execution is strictly prescribed, the intention of the testator to make and finally leave at his death a conditional will must appear very clearly on the face of the will.<sup>1</sup> But as to evidence outside the instrument, and particularly mere declarations and other oral proof, while, doubtless, such testimony is inadmissible to control the construction of the will, or contradict its clear expression of intent, it may still be asked whether the court is not at liberty to go outside in case of inevitable doubt, to help resolve an ambiguity.<sup>2</sup>

291. **Wills may be expressed so as to take effect in the alternative with reference to a stated contingency.**<sup>3</sup>

292. **The contingent or conditional wills we have described involve the construction of an instrument** whose conditional import appears upon its face. A will duly executed *animo testandi* and in form absolute is not to be shown contingent or conditional and inoperative by extrinsic proof.<sup>4</sup>

293. **One cannot confide to another the right to make a will for him,** nor authorize any person to revoke his will after his death.<sup>5</sup> Yet in a recent case where the operation of a will was left to the option of a survivor, that option was sustained.<sup>6</sup>

<sup>1</sup> Careless and inartificial expressions, however, are to be treated with ample allowance, technical informalities disregarded, traces of the testator's intention sought out in every part of the instrument, and the whole carefully weighed together.

<sup>2</sup> Authority is not explicit on this point; nor perhaps can so extreme a case be found in our modern practice; but certainly such oral proof is not favored, and the court prefers to put its own construction upon the language contained in the will. Yet it is held, and with good reason, that the surrounding circumstances of the execution may be shown to aid in ascertaining the true effect and interpretation of the will. See *French v. French*, 14 W. Va. 460; *Kelleher v. Kernan*, 60 Md. 440; 2 Bradf. Sur. 204 (sensible observations by the court). And even conceding, as we must, that our Wills Acts exclude all parol evidence of recognition, adherence to the will, or ratification after the peril was past (since a republication is required), *semble* the very circumstance that the will in question has never been cancelled, but is produced from proper custody on the testator's death and presented for probate, may be adduced in favor of its intended validity. For, after all conditional wills are of so peculiar a description, and operate usually so disastrously, not to say senselessly, that any doubt should be resolved in favor of absolute character and a probate.

<sup>3</sup> As if a testator should execute one will, and afterwards a second will; and then by a third will or codicil declare that the first will shall be his last will if he dies before a given date, otherwise the second will shall be his last will. *Hamilton's Estate*, 74 Penn. St. 69. The point of contingency should be definitely stated in such a case, and the alternate instruments well identified.

<sup>4</sup> *Sewell v. Slingsluff*, 57 Md. 537.

<sup>5</sup> *Supra* 263; 1 Robert. 661; 6 Jur. 564.

<sup>6</sup> In *Smith's Goods*, L. R. 1 P. & D. 717, the court took the ground that there is nothing in the law or common sense to prevent a testator from saying that the question whether his will shall fundamentally operate, that is, become a will at all or not, shall depend upon something to happen after his death. Such a proposition, we submit, is open to grave dispute. A testator here wrote a codicil to his will and gave his wife the option of adding it to his will or not, at her discretion. She dis-

294. **There are documents designed for posthumous effect, which cannot be probated as wills for want of the character essential to such dispositions.<sup>1</sup>**

295. **Our American policy is to require a probate of all wills, whether relating to realty or personalty, or to both together.<sup>2</sup>**

296. **Writings which merely revoke have been refused probate in various instances.<sup>3</sup>** Yet a separate instrument, duly signed and attested, which declares one's intent of revoking a former will, or all former ones, and that his estate shall be settled according to law, is undoubtedly a will and should be admitted to probate as such.<sup>4</sup>

297. **A will which simply nominates an executor, is a good one, and entitled as such to probate.<sup>5</sup>** Wills, on the other hand, are good in modern practice, which make provision for settling the estate but name no executor at all.<sup>6</sup>

sented after his death and the codicil was refused probate. Suppose she had died too early to exercise such option or had long delayed making her decision?

<sup>1</sup> Thus a paper executed as a last will, which does no more than name a guardian for one's children, and neither disposes of property nor nominates an executor, is excluded from probate. 3 Sw. & Tr. 422. But in various American States, legislation confers upon the probate court original jurisdiction in the appointment of guardians as well as executors, and makes special mention of testamentary guardians, besides. Nor is the mere written appointment to a situation after one's death a testamentary paper. *Thorncroft v. Lashmar*, 2 Sw. & Tr. 479. Nor is a written direction to have the body cremated. *Meade's Estate*, 118 Cal. 428, 62 Am. St. Rep. 244, 50 P. 541. Nor is an instrument regarding the adoption of a child. *Chehak v. Battles*, 133 Iowa, 107, 110 N. W. 330. It is not enough that the instrument purports to be a will and is executed with all the testamentary formalities, when it accomplishes nothing of a testamentary character. See *Coffman v. Coffman*, 85 Va. 459, 17 Am. St. Rep. 69, 2 L. R. A. 848, 8 S. E. 672.

<sup>2</sup> Exrs. 59, *post*; *Shumway v. Holbrook*, 1 Pick. 114, 11 Am. Dec. 153; *Wilkinson v. Leland*, 2 Pet. 655, 7 L. Ed. 552, local statutes. But the old English rule confined ecclesiastical courts to personal property jurisdiction, leaving pure devises to be established in courts of common law. 1 Wms. Exrs. 341, 388. And see L. R. 3 P. & D. 177; *Barden's Goods*, L. R. 1 P. & D. 325; *Tamplin's Goods*, (1894) P. 39 (domestic probate refused in will of foreign land).

<sup>3</sup> The distinction drawn is a delicate one. *Fraser's Goods*, L. R. 2 P. & D. 40. See *post*, Part IV.

<sup>4</sup> *Bayley v. Bailey*, 5 Cush. 245; *Hicks's Goods*, L. R. 1 P. & D. 683.

<sup>5</sup> *Lancaster's Goods*, 1 Sw. & Tr. 464; *Mulholland v. Gillan*, 54 A. 928, 25 R. I. 87 (payment of debts also provided); *Stewart v. Stewart*, 59 N. E. 116, 177 Mass. 493; *Miller v. Miller*, 32 La. Ann. 437; 17 Hun, 72. The fact that such executor afterwards renounces the appointment cannot change the character of the instrument nor deprive it of probate. *Jordan's Goods*, L. R. 1 P. & D. 555. One who is simply made an executor is clothed by implication with the usual functions pertaining to the office; and as for the property, silence imports a descent and distribution such as the statute prescribes for intestate estates; though, doubtless, it is expedient that wills of this sort should expressly direct a final settlement after that course. See Exrs. 31, *post*.

<sup>6</sup> Exrs. 3, 122, *post*. And see *Brady v. McCrosson*, 5 Redf. 431; *Myrick Prob.* 76.

The effect of naming no executor, or of renunciation by the executor named, is to admit the will to probate; the court constituting an administrator with the will annexed for the emergency. See Exrs. 122, *post*.

298. Wills, furthermore, are good which make only a partial distribution or distribute as in case of intestacy.<sup>1</sup>

298a. A will may be good notwithstanding blank spaces left in the body of the instrument, if the instrument itself be coherent and consistent.<sup>2</sup> As to interlineations or erasures, these if made after execution do not affect the will except *pro tanto*; and the presumption is that they were made before execution.<sup>3</sup>

299. Appointments by will in exercise of any power, require now for their validity the same formalities of execution and attestation as other wills, and nothing beyond, notwithstanding any terms which may have been employed in creating the power.<sup>4</sup>

<sup>1</sup> Exrs. 250, *post*; Lucas v. Parsons, 24 Ga. 640, 71 Am. Dec. 147.

<sup>2</sup> Barnewell v. Murrell, 108 Ala. 366, 18 So. 831; 73 S. W. 129, 173 Mo. 59.

<sup>3</sup> 83 N. Y. S. 650; 6 Dem. 162; Jersey v. Jersey, 110 N. W. 54, 146 Mich. 906. See 334, *post*. And see Southworth v. Southworth, 73 S. W. 129, 173 Mo. 59.

<sup>4</sup> 1 Sw. & Tr. 70; Hubbard v. Lee, L. R. 1 Ex. 255; 13 W. R. 394; Blackburn, *Re*, 43 Ch. D. 75; Huber, *Re*, (1896) P. 209. Cf. former English rule in 3 Phillim. 394. Such questions seldom occur in American practice.

## CHAPTER II.

## SIGNATURE BY THE TESTATOR.

300. In England a will of personal property was valid without any signature by the testator, until the statute of 1 Vict. c. 26 came into operation; that is to say, if made before Jan. 1, 1838.<sup>1</sup> But under this later statute the prescribed formalities apply equally to wills of real and personal property.<sup>2</sup>

301. In America the policy of the older Statute of Frauds in this respect has strongly impressed the testamentary jurisprudence of our several States. But, admitting local variations as to the number of attesting witnesses required, and, of course, local exceptions of principle, our American legislatures insist, usually at this day, upon a formal signature and attestation to each will, codicil, or testament,<sup>3</sup> regardless of the character of the property embraced under the disposition, and to much the same effect as the English Statute of 1837; but, on the whole, with less nicety of expression.<sup>4</sup> As local codes differ, our present investigation must be held strictly subject to local variations of statute requirement, wherever the essential formalities of execution come up for discussion.<sup>5</sup>

302. In general phrase one may speak of the proper "execution" of a will as involving the full legal formalities of a signature and attestation; and for convenience we have usually so employed that word in these pages.<sup>6</sup>

<sup>1</sup> 4 Hagg. 382; 1 Wms. Exrs. 68; *supra*, 253. But the Statute of Frauds (29 Car. II, c. 3, § 19) had imposed strict requirements in devises of land.

<sup>2</sup> 1 Vict. c. 26 declares that no will shall be valid unless in writing, and signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary. It is under this latter statute that the modern English cases which deserve our chief study are ranged.

<sup>3</sup> Except as to the few permitted instances of nuncupative wills. See c. IV, *post*; 37 S. E. 707, 112 Ga. 450.

<sup>4</sup> Of the peculiar virtue ascribed to holograph wills, even to this day, in various States, some of whose legislatures insist, nevertheless, that the testator's own writing shall be signed by the testator himself, we have already spoken. *Supra*, 255.

<sup>5</sup> Local legislative requirements must be complied with. 77 Ohio St. 104, 17 L. R. A. (N. S.) 353, 82 N. E. 1067. If no "signature" by testator, the will is invalid though witnesses sign. 77 N. Y. S. 651.

<sup>6</sup> Statute 1 Vict. c. 26, § 9, sanctions this use of the word. It declares that no will shall be valid unless in writing "and executed in manner hereinafter mentioned"; and then proceeds to describe the details of signing, acknowledging, and attesting the will



303. What amounts to a "signing" by the testator so as to satisfy the statute requirement on the subject of wills? To write out one's own name in full is doubtless the safest course, as well as the most natural; for such compliance best indicates a rational mind, free will, and physical power, at the date of execution. But, undoubtedly, the making of his mark or cross by the testator will satisfy the statute; and that, too, as various cases rule, notwithstanding he was able to write at the time.<sup>1</sup> Other modes of signature are permitted besides.<sup>2</sup>

304. An imperfect or indistinct signature, or even, as sometimes held, an assumed signature, may satisfy the statute by passing as

But some authorities appear to apply the words "execution" and "attestation" separately, as though the former term related only to the testator's own act; and use "execution and attestation" to denote the whole formality. See 1 Jarm. Wills, title to c. 6, etc. This narrower sense of the word "execution" is not to be commended for modern practice.

<sup>1</sup> Thus has it been held in cases arising under the Statute of Frauds; and those decisions apply equally to the Statute of Victoria, which is expressed in language almost identical; as also to most American codes. *Baker v. Denning*, 8 Ad. & El. 94; *Sprague v. Luther*, 8 R. I. 252; *Chase v. Kittredge*, 11 Allen, 49, 87 Am. Dec. 687; *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666; 23 So. 687, 127 Ala. 14; 61 Penn. St. 196; 2 Curt. 325; *Jenkins's Will*, 43 Wis. 610; 19 Mo. 609.

<sup>2</sup> Accordingly, the will has been upheld where the testator made a mark, with his hand guided or not. *Wilson v. Beddard*, 12 Sim. 28; 103 Minn. 286, 114 N. W. 838; 5 John. 144, 4 Am. Dec. 330; 12 Cush. 332; *Upchurch v. Upchurch*, 16 B. Mon. 102; 49 Neb. 157, 68 N. W. 372; 43 Wis. 610; 140 Ill. 649, 33 Am. St. Rep. 265, 30 N. E. 383; 107 Iowa, 723, 70 Am. St. Rep. 228, 77 N. W. 467. Or where the testator wrote only his initials. *Savory, Re*, 15 Jur. 1042. And see *L. R. 9 Ir. 443*. Or where his full signature was effected by the aid of another person who guided his hand. *Vandruft v. Rinehart*, 29 Penn. St. 232; 74 N. Y. S. 1045; 4 Wash. (U. S. Cir.) 262; 12 Sim. 28; *Wood v. Trust Co.*, 61 A. 757, 27 R. I. 295. Or where he stamped his name. See 3 Sw. & Tr. 93. Or where only the Christian name was signed. *Knox's Estate*, 131 Penn. St. 220, 17 Am. St. Rep. 798, 18 A. 1021. Provided that in all such cases the testator's knowledge and free consent and completed testamentary purpose accompany the act, which here is an act of signature by himself. It is obvious that a testator may know how to write and yet at the time of execution be physically unable to do so. See *Guilfoyle's Will*, 96 Cal. 598, 22 L. R. A. 370, 31 P. 553.

The statute is satisfied, moreover, where, the testator having requested another to sign the paper as his will for him, the latter complies under the strict precautions of the local code. 30 Penn. St. 218; *Abraham v. Wilkins*, 17 Ark. 292; 49 Neb. 157; 76 Neb. 823, 107 N. W. 1016; 76 S. W. 361, 25 Ky. Law, 763. Or where, in the testator's presence and by his direction, another person under the same precautions stamps the will by way of signature with an instrument on which the testator has had his usual signature engraved for convenience in stamping letters or other documents requiring his signature. *Jenkins v. Gaisford*, 3 Sw. & Tr. 93 (testator paralyzed, and the stamp made for him on that account). For under the Statute of Frauds, as well as the Wills Act of Victoria, and by various codes in the United States, provision is made for the signing of the will, not only by the testator himself, but also by some other person in his presence and by his express direction. *Supra*, 300, 301; *Riley v. Riley*, 36 Ala. 496. There are States, however, where this signing by another is placed by legislation under much narrower restraints. *McElwaine, Re*, 3 C. E. Green, 499; *Vines v. Clingfost*, 21 Ark. 309. Assent and knowledge by the testator without his "express direction," are insufficient. 48 Neb. 608, 67 N. W. 470.

the testator's mark, if actually intended by him as his signature.<sup>1</sup>

305. But while other modes may satisfy the letter of legal requirement, no one who is competent to write out his own signature executes his will wisely, unless he either signs thus or shows some good reason to the contrary, which can be explained at the probate. For the burden of establishing the instrument he leaves behind is sufficiently great, even though he should cast no needless discredit upon it. The uncommon modes of signing mostly import illiteracy, feebleness, or dependence upon others, and easily encourage the imputation of fraud, imposition, or error in the transaction, unless very cautiously pursued.<sup>2</sup>

306. If the rule on this subject appears rather uncertain, we must allow for local variations in statute and each legislative policy. Also we should bear in mind that signature by the testator himself and signature by another are distinguished in all these codes.<sup>3</sup>

<sup>1</sup> 2 Robert. 339; 15 Jur. 1042; *Hartwell v. McMaster*, 1 Redf. 389; *Smith v. Dolby*, 4 Harring. 350; *Burford v. Burford*, 29 Penn. St. 221 (statute changing former rule); 30 Penn. St. 218. Cf. 34 Fed. 82; 23 Atl. 1038; where intention to sign was incomplete. If the testator makes his mark to the will as his own, the fact that another wrote the testator's name wrong against the mark does not invalidate it. *Rook v. Wilson*, 142 Ind. 24, 51 Am. St. Rep. 163, 41 N. E. 311. It is the mark and not the name or words written round it by another which constitutes the "subscription." *Jackson v. Jackson*, 39 N. Y. 153; 91 Penn. St. 236.

<sup>2</sup> Mr. Jarman, writing for English readers, considers it inadvisable for a testator in these days to sign by another, unless physically very weak, so that he cannot even make his mark. 1 Jarm. Wills, 110. And see (1891) App. C. 435. In Pennsylvania, and some other States, the testator must sign by his own proper signature, if he is able to do so. 26 Penn. St. 219. And see 1 Barb. 526; *Fritz v. Turner*, 46 N. J. Eq. 515, 22 A. 125. The statute "inability" to sign is not to be harshly construed. 169 Penn. St. 316, 47 Am. St. Rep. 908, 32 A. 424. And though most authorities have ruled less positively on the subject, it seems always proper, where a testator habitually wrote his own name and did not in this instance, for the court, in case of a contest and doubt, to try and elicit some explanation. Signing by another is especially liable to doubt and suspicion. Nevertheless, the general rule in the American States is said to be, that the testator may sign by his mark, and that where he does so, it will be presumed that he does it from necessity, either temporary or permanent. 1 Redf. Wills. 205, note, citing *Upchurch v. Upchurch*, 16 B. Mon. 102; and *Ray v. Hill*, 3 Strobb. 297.

<sup>3</sup> In American policy there is by no means the same facility accorded for signature by another where a will is to be executed as in the ordinary transactions of life. If an illiterate but intelligent testator makes cross-strokes with his pen upon the paper, the act of signature is his own; and so, too, where the hand of a testator, who is physically unable to subscribe without assistance, is guided by another. Wherever, in truth, the act is the testator's own act, *animo testandi*, though with the assistance of another, it is not necessary to prove any express request for assistance on his part. See 44 Barb. 494; *Vandruff v. Rinehart*, 29 Penn. St. 232. And under any circumstances, a testator signs his will, where he makes the physical effort, and performs the act, even though his hand be steadied or guided by another, if something is produced upon the paper sufficient to identify his signature, and his own purpose to sign accompanied the action, while he was assisted and not controlled. See *Fritz v. Turner*, 46 N. J. Eq. 515, 22 A. 125.

But the mere fact that the testator's name is written, or his mark made by another person, affords no presumptive evidence that it was done at his request and in his

307. In England it has been held that where the testator duly acknowledged his signature to the attesting witnesses, this is *prima facie* sufficient, without proving that the signature is in his handwriting or that it was made by some other person in his presence and by his direction.<sup>1</sup> And the person who signs for the testator, at the latter's express request, may sign the will by and for him, using his own name.<sup>2</sup>

308. A testator's name may be affixed by a competent subscribing witness, at his request and in his presence, as well as by any third party; and the effect of this is the same as though the name were written by the testator himself.<sup>3</sup>

309. A seal is not indispensable to a will in modern times, unless, as rarely happens, the local statute insists upon it.<sup>4</sup> Nor is a will rendered invalid for want of a seal, even though the attestation clause should speak of its being "signed and sealed."<sup>5</sup> It is clear that signing and sealing are different acts, though capable of being united.<sup>6</sup>

presence. *Greenough v. Greenough*, 11 Penn. St. 489, 51 Am. Dec. 567. As to this act of another under authority from the testator, the statute direction, usually imperative and strict, must be carefully observed; for wherever the "signing" is, so to speak, not the testator's own, but something which he is to adopt, great hazard is incurred. A subscription, "A. B. for C. D., at his request," is held a sufficient form to be followed. *Vernon v. Kirk*, 30 Penn. St. 218; *Abraham v. Wilkins*, 17 Ark. 292. And under many State codes this form would doubtless be dispensed with, upon due proof of the surrounding circumstances, showing that all was rightly and properly done. But there are American codes which insist upon more than this. See e.g. 3 C. E. Green (N. J.) 499; 26 Penn. St. 219; 21 Ark. 309; 21 Mo. 17. Cf. 33 Ohio St. 598, 31 Am. Rep. 579; 80 Va. 293. And generally speaking, there must be no ambiguous proof of authority to sign on the testator's behalf; for "express direction," and not indirect permission, is the usual intentment of our codes. *Waite v. Frisbie*, 45 Minn. 361, 47 N. W. 1069.

<sup>1</sup> *Gaze v. Gaze*, 3 Curt. 456.

<sup>2</sup> *Clark's Goods*, 2 Curt. 329. See further, 1 Jarm. Wills, 110.

<sup>3</sup> *Herbert v. Berrier*, 81 Ind. 1; 27 Barb. 556; 6 Dem. 262; 70 P. 489, 30 Wash. 239; *Riley v. Riley*, 36 Ala. 496. But see 3 C. E. Green, 499 (peculiar statute). And see *Vines v. Clingfost*, 21 Ark. 309; 14 Mo. 611, 55 Am. Dec. 129; *Leonard, Ex parte*, 39 S. C. 518, 22 L. R. A. 302, 18 S. E. 216. So in England. *Bailey's Goods*, 1 Curt 914; 1 Robert. 262.

<sup>4</sup> 4 Mass. 460; 1 McLean, 69; 2 Blackf. 355; *Grubbs v. McDonald*, 91 Penn. St. 236

<sup>5</sup> 8 Mo. App. 66. In various American States, the use of a seal has lost most of the efficacy our common law once bestowed upon it. But testaments are still signed and sealed in very many instances; and this solemn but simple precaution may often prove a sensible one for allaying doubt, where powers touching real estate are expressly given. The *lex loci* as to the method of conveying land should not be unheeded. A few States still require a seal as to land. See *Wuesthoff v. Life Ins. Co.*, 107 N. Y. 580, 14 N. E. 811 (will not made a deed by adding a seal).

<sup>6</sup> 3 Lev. 1; 17 Ves. 458; *Pollock v. Glassell*, 2 Gratt. 439; 1 Jarm. Wills, 78. See L. R. 9 Ir. 443.

310. A mere misnomer or discrepancy of signature does not vitiate the paper, provided its genuineness as the intended will be duly established.<sup>1</sup>

311. The place or position of signature to the will is insisted upon more strictly by some codes than others. The Statute of Frauds merely required that the will should be "signed" by the testator; and hence, a will, intended as such, and expressed in the testator's own handwriting, which commenced "I, A. B., do declare this to be my last will," etc., was treated as made in literal compliance with the act, though no signature was added at the end.<sup>2</sup> But the mischief of setting up holographic wills which were likely enough to have been no more than the rough sketch of a will was apparent enough when the Statute of Victoria was framed. That statute, as we have seen, designated the foot or end of the will, as the place where the testator should write his signature.<sup>3</sup>

<sup>1</sup> As where the will of T. D. describes the testator throughout by a wrong name, such as C. D., and he signs it by his right one. Douce's Goods, 2 Sw. & Tr. 593. And see 1 Sw. & Tr. 22. Or where the maiden name of a testatrix is interchanged with her married one under like circumstances. Ib. And generally, where one signs *animo testandi*, though by a wrong or assumed name, or with alternative names. 2 Robert. 339; Long v. Zook, 13 Penn. St. 400. But cf. 2 Bradf. 244 (forged will); 215 *supra*, as to palpable error or fraud. See also Tyler v. Theilig, 52 S. E. 606, 124 Ga. 204 (both foreign and native surname). A signature, whether by name or mark, satisfies the statute, notwithstanding the testator's name does not appear at all in the body of the instrument. Bryce's Goods, 2 Curt. 325.

All such errors, discrepancies, or omissions may be corrected, reconciled, or supplied by proof *alunde*.

<sup>2</sup> Pre. Ch. 184; 3 Lev. 1; Coles v. Trecothick, 9 Ves. 249; 1 Jarm. Wills, c. 79; 1 Wms. Exrs. 78.

<sup>3</sup> *Supra*, 300. Doubts soon arose, however, in the construction of 1 Vict. c. 26 (1837), on this very point of a signature at the foot; for testators would carelessly sign far below where the will itself was written, or at the foot of the attestation clause, or in other out of the way places; and the question had to be decided whether the statute was thus complied with or not. At first inclined to a liberal interpretation, the courts soon settled upon a strict one; and in consequence the intentions of many who had not closely marshalled the body of the will behind the maker's own signature were frustrated. 1 Wms. Exrs. 78; 1 Robert. 618; 6 Moore P. C. 404. Hence was enacted afterwards the Stat. 15 Vict. c. 24 (1852), which somewhat verbosely explained the former act, and brought within its remedial scope not only future wills, but those already made, upon whose defective execution the settlement of the estates concerned had not yet been directed. The purport of this explanatory act was to make the precise place of signature of minor consequence, provided the signature itself was so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it could be gathered from the face of the will that the testator intended thereby to give the instrument effect as his will. While a more liberal turn is thus given to the latest decisions, there remains uncertainty still, as to precisely what shall constitute a valid signature in respect of position, so as to take the whole will under its cover. See among the later English cases construing these statutes, Pearn's Goods, 1 P. D. 70; Huckvale, *Re*, L. R. 1 P. & D. 375; Wotton's Goods, L. R. 3 P. & D. 159; Royle v. Harris, (1895) P. 163; Anstee's Goods, (1893) P. 283; Hunt v. Hunt, L. R. 1 P. & D. 209; 12 P. D. 8, 107; Wms. Exrs. 79-82.

312. The statutes of several American States expressly require the testator to sign his name at the end of the will; as in New York, Pennsylvania, Ohio, California and Kentucky.<sup>1</sup> And unquestionably this is the most natural and proper place of signature; the attestation clause following, if there be one. But most of our codes are silent on this point; and the principle which they inculcate is, rather, that the place of signature is of secondary consequence, provided only that, wherever the testator may have chosen to place his name, he meant it to stand for his final signature, and thereby authenticate the entire instrument as propounded.<sup>2</sup> From either legal standpoint, anything which appears to have been interpolated, added, or altered after the signature was affixed to the will fails of authentication unless adopted by the maker before his will is acknowledged, attested, and completely executed; nor should his signature take effect at all unless fully intended by him as such; and the only radical difference in policy in our codes appears to consist in the formal precautions which the legislature may have taken to prevent either apprehended mischief.<sup>3</sup>

<sup>1</sup> 91 N. Y. 261, 106 Am. St. Rep. 53; 80 P. 700, 146 Cal. 455; 5 Whart. 386; 1 Duv. 126; 17 Ohio St. 134. And as to wills of real estate see *Combs v. Jolly*, 2 Green Ch. 625, 80 P. 654.

<sup>2</sup> The rule is essentially that under the English Statute of Frauds, upon which our wills acts are based. *Supra*, 311; *Hall v. Hall*, 17 Pick. 373; *Upchurch v. Upchurch*, 16 B. Mon. 102; *Ramsey v. Ramsey*, 12 Gratt. 664; *Adams v. Field*, 21 Vt. 256, 65 Am. Dec. 254; *Armstrong v. Armstrong*, 29 Ala. 538; 103 Ill. App. 528. But there should be an intended *bona fide* signing. See *Warwick v. Warwick*, 86 Va. 596, 6 L. R. A. 775, 10 S. E. 843.

As for States whose codes originated in the civil law, there are special reasons why the testator's name in the body of the writing should not be treated as a signature when not intended as such, even though the writer supposed no signature necessary. See *Armant's Will*, 43 La. Ann. 310, 26 Am. St. Rep. 183, 9 So. 50.

<sup>3</sup> Some late cases apply the local statute, which requires the will to be signed and witnessed at the end, so as to reject what may happen to follow these signatures as constituting no part of the will. See *Hewitt's Will*, 91 N. Y. 261; 91 N. Y. 516; *Conway's Will*, 124 N. Y. 455, 11 L. R. A. 796, 26 N. E. 1028; *Whitney's Will*, 153 N. Y. 259, 47 N. E. 272, 60 Am. St. Rep. 616; 6 Dem. 298. See also *Wineland's Appeal*, 118 Penn. St. 37, 4 Am. St. Rep. 571, 12 A. 301 (signature preceding final clause which appoints executors); *Glancy v. Glancy*, 17 Ohio St. 134 (an unfinished execution). As to a will not signed "at the end" under a local code, see 1 Duv. 126; *Seaman's Estate*, 80 P. 700, 146 Cal. 455, 106 Am. St. Rep. 53 (folds in a printed blank); *Irwin v. Jacques*, 71 Ohio St. 395, 73 N. E. 683, 69 L. R. A. 422; *Andrew's Will*, 56 N. E. 529, 162 N. Y. 1, 48 L. R. A. 662, 76 Am. St. Rep. 294 (will with several pages); 77 Ohio St. 104, 17 L. R. A. (N. S.) 353, 82 N. E. 1067. But a codicil properly executed may reaffirm in such cases. 78 N. Y. S. 103; 448, *post*. And see sufficient subscription in *Ward v. Putnam*, 85 S. W. 179, 27 Ky. Law. 367; *Morrow's Estate*, 54 A. 313, 204 Penn. 476; *Younger v. Duffie*, 94 N. Y. 535, 46 Am. Rep. 156; 68 P. 827, 136 Cal. 306, 89 Am. St. Rep. 135.

Some American cases seem to consider that the testator's purpose and intention to sign must appear on the face of the will. See *Waller v. Waller*, 1 Gratt. 454, 42 Am. Dec. 564; *Graham v. Graham*, 10 Ired. 219; 13 Gratt. 664, 70 Am. Dec. 438. But this is perhaps too narrow a view to take. Where, indeed, the testator's name was

313. **But a final signing must have been intended**, whatever the place of the testator's signature.<sup>1</sup>

314. **One signature may suffice for several sheets of paper**; and the natural if not the imperative place for signing is where the will ends on the last sheet; though, as a precaution against fraud, a maker sometimes places his name on the consecutive sheets.<sup>2</sup> Where the testator signs the will on several sheets, or in different places, the last signature, if at the end of the will, is the efficient one.<sup>3</sup>

315. **Where, again, it appears that a will has been written by portions**, various clauses being composed and inserted at different times, one signature and attestation applies sufficiently to each and all of the dispositions contained in the instrument as they finally stood at the date of execution.<sup>4</sup>

316. **A valid signature may be made on a separate piece of paper** which is stuck or fastened to the body of the will, and contains nothing but the signature and attestation;<sup>5</sup> provided it be shown

written only at the commencement of the will, the end being left blank, the presumption may well be that in the legal and natural sense he did not sign. But his subscription at the end, not of the testimonium, but of the attestation clause (or in the midst of the latter), indicates the contrary rather. *Hallowell v. Hallowell*, 88 Ind. 251. See 190 Penn. St. 382, 42 A. 1020. The acknowledgment of the instrument before attesting witnesses (who subscribe their names), without alluding to any further act of signing or otherwise qualifying the execution, may be taken as a strong circumstance in favor of intended signature, wherever the maker's name may be found; for if he fails to sign in due form, it is probably through inadvertence; and, *vice versa*, his signature without an attestation can avail little in modern policy. And there seems no reason why the surrounding circumstances of execution may not be investigated to resolve a doubt and conclude the issue justly by the evidence. 1 Dougl. 241; 13 Gratt. 664, 70 Am. Dec. 438; 17 Ohio St. 134. For after all these statute precautions the integrity and genuineness of the instrument should be the main concern at the probate. Whatever the testator may have added to his will after a full attestation clause can be left out of probate as surplusage and unessential. *Baker v. Baker*, 51 Ohio St. 217, 37 N. E. 125; 65 A. 799, 216 Penn. 350; 91 N. Y. 516.

<sup>1</sup> A name originally written without such final design may have that final effect afterwards, by the testator's subsequent adoption of the signature as his final one, and such would probably be presumed his intention if he acknowledged the instrument as his will to the attesting witnesses without alluding to any further act of signing. But if, on the other hand, the testator intended, to the last, another signature which he never made, the will should be considered as unsigned. 1 Jarm. Wills, 79; 1 Dougl. 241. And so, too, it would appear, if the testator supposed no signature at all essential; to say nothing of its incomplete execution in other respects which the local statute made essential.

<sup>2</sup> See 284, *supra*, and cases cited; 4 Comst. 140; 15 Penn. St. 281, 53 Am. Dec. 597; *Ela v. Edwards*, 16 Gray, 91; 4 Strobb. 188. The question whether or not all the sheets of the will as propounded were attached at the time of signature, or there has been a fraudulent or informal change since, is to be decided as an issue of fact upon all the evidence. 10 Penn. St. 98.

<sup>3</sup> *Evans's Appeal*, 58 Penn. St. 238.

<sup>4</sup> *Catrrall's Goods*, 4 Sw. & Tr. 419.

<sup>5</sup> *Horsford, Re*, L. R. 3 P. & D. 211; 2 Sw. & Tr. 362; 3 Sw. & Tr. 46

that the execution was *bona fide* and regular in other respects, and the paper duly fastened at or before the time of attestation.<sup>1</sup>

317. **With regard to the blind and illiterate**, and all who cannot read what is written out as their will, our law requires satisfactory proof of some kind to the effect that the testator knew and approved of the contents of the will which was executed as his own.<sup>2</sup> Corresponding considerations may apply to the wills of those who are deaf, but not blind.<sup>3</sup> The genuine and authentic will of an illiterate person or foreigner is to be probated and sustained in its fair scope and intent notwithstanding any ungrammatical or unlearned expression.<sup>4</sup>

317a. **As to the evidence of execution**, the declarations of a testator, before or after making a will, are inadmissible on such an issue.<sup>5</sup> And evidence of one's intentions long before making his will, or under remote circumstances, is properly excluded.<sup>6</sup> The presumption is that the testator who signs knew and approved contents and executed the will understandingly.<sup>7</sup>

<sup>1</sup> 32 L. J. Prob. 182; 1 Jarm. Wills, 79.

<sup>2</sup> 1 Sw. & Tr. 540; *Martin v. Mitchell*, 28 Geo. 382; 9 Md. 540; *Day v. Day*, 2 Green Ch. 549; 6 Dem. 478; *Worthington v. Klemm*, 144 Mass. 167, 10 N. E. 522; 3 Strobb. 297; *King v. Kinsey*, 74 N. C. 261. Such a will may be read over to the testator before signing, apart from or in presence of his witnesses. *Martin v. Mitchell*, 28 Geo. 382; 2 Bradf. 261; 9 Md. 540; 2 Dev. Law, 291. Or it may be shown that the contents were correctly made known to him without any formal reading at all. *Fincham v. Edwards*, 3 Curt. 63; 4 Moore P. C. 198; 3 Leigh. 32; *Hess's Appeal*, 43 Penn. St. 73, 82 Am. Dec. 551; 11 Phila. 161. See 19 N. E. 503, 111 N. Y. 624; 57 S. W. 526, 157 Mo. 1, 80 Am. St. Rep. 604. Provided it appear, on the whole, that the instrument as drawn up and executed constituted his own testamentary disposition as intended by him. *Perera v. Perera*, (1901) App. Cas. 354 (will drawn in strict accord with instructions sufficient); *Massey's Estate*, 62 A. 640, 213 Penn. 136; *Beyer v. Hermann*, 73 S. W. 164, 173 Mo. 295 (true copy of a draft). Less than this, however, is unacceptable; and where the will, without being read over or examined, is signed by the testator upon an assurance that it has been prepared according to his instructions, when in point of fact it has not been, probate should be refused. *Waite v. Frisbie*, 45 Minn. 361, 47 N. W. 1069.

<sup>3</sup> A testator of this latter description would fitly assure himself that the instrument is correct by reading it over instead of having it read to him; and here, once more, the controlling question would be whether the instrument in question embraced his testamentary intentions. See also 94-99, *supra*.

<sup>4</sup> See *Mitchell v. Donohue*, 100 Cal. 202, 38 Am. St. Rep. 279, 34 P. 614.

<sup>5</sup> *Kennedy v. Upshaw*, 64 Tex. 411; 80 P. 654 (letter); *Couch v. Eastham*, 27 W. Va. 796, 55 Am. Rep. 346; *Walton v. Kendrick*, 122 Mo. 504, 25 L. R. A. 701, 27 S. W. 872. See as to mental capacity, or undue influence, etc., 193-195, 243, 244. And see 403.

<sup>6</sup> 165 Mass. 493, 43 N. E. 299; 108 Cal. 608; 158 Ill. 314, 41 N. E. 912. But cf. 102 Mich. 568, 61 N. W. 3.

<sup>7</sup> 62 N. E. 800, 194 Ill. 425 (a foreigner); 73 N. E. 338, 213 Ill. 552, 104 Am. St. Rep. 234; 25 N. W. 538, 64 Wis. 487, 54 Am. Rep. 640; 37 S. C. 348, 16 S. E. 38.

## CHAPTER III.

## ATTESTATION AND SUBSCRIPTION BY WITNESSES.

318. In England wills of personal property made before January, 1838, needed no attestation or subscription in order to operate; custody was their sufficient publication, although it was safer and more prudent, as the jurists used to say, and left less in the breast of the ecclesiastical judge, if they were published in the presence of witnesses.<sup>1</sup> But witnesses were often called in, nevertheless, to attest and subscribe one's will; and after the Statute of Frauds rendered such attestation and subscription necessary for wills of real estate, it became quite common for a testator to waive the legal exemption in favor of his personalty, and guard the final disposition as a whole by a due subscription; his three witnesses signing their names after an attestation clause.<sup>2</sup>

319. But under modern statutes the rule of attestation by subscribing witnesses is far more widely imperative. Thus in England, by the Wills Act, 1 Vict. c. 26, § 9, it is enacted that no will made on or after January 1, 1838, shall be valid, unless the signature is "made or acknowledged by the testator in the presence of two or more witnesses present at the same time;" and these witnesses are to attest and subscribe the will in the testator's presence, no particular form of attestation, however, being necessary.<sup>3</sup> In the several American States will be found local statutes with local differences of detail; so that no single principle can be laid down to embrace the entire doctrine, as the present chapter will show.<sup>4</sup>

<sup>1</sup> 3 Add. 224; Com. Rep. 452; *Miller v. Brown*, 2 Hagg. 211. See 1 Wms. Exrs. 84, 85.

<sup>2</sup> Hence came the rule, that where an instrument drawn up as one's will professed to dispose of both real and personal property, or even personalty alone, but an attestation clause was appended without signatures, it should be presumed that the testamentary intention never took full effect. 1 Add. 154, 159; 1 Meriv. 503; 4 Ves. 186; 5 Ves. 23. Cf. 2 Add. 42. But this rule was one of presumption merely, proceeding, of course, upon the theory that the incomplete execution showed an incomplete purpose. 1 Wms. Exrs. 85, 86; 1 Hagg. 252, 551, 596, 608; 3 Phillim. 323.

<sup>3</sup> A comparison of this act with the old Statute of Frauds will show various points of difference. See 1 Wms. Exrs. preface.

<sup>4</sup> Witnesses vary in number; in some States, as under the old Statute of Frauds, they are to "attest and subscribe" the will, and nothing is said about requiring a testator to "make or acknowledge" the will in their presence; nor do all States insist that all the witnesses shall attest and subscribe in the presence of one another, but merely in the presence of the testator, another feature copied from the earlier English enactment. In fact, our American wills acts appear based in expression less upon



320. **First, as to the number of subscribing witnesses required.** By the present English statute, two witnesses at least are requisite, whatever the kind of property disposed of.<sup>1</sup> As for this country, there must be at least three witnesses by the rule now or lately prevalent in most parts of New England; also in a few Southern states. Two witnesses, however, now suffice in the majority of American States.<sup>2</sup> A paper is void as a will when executed with less than the number of witnesses locally prescribed, and not even a probate can give the instrument full validity;<sup>3</sup> but more than the requisite number can do no harm.<sup>4</sup>

321. **Next, to consider the signing or acknowledgment of the will before the witnesses.** Upon this point is found a difference of statute expression and hence of statute construction, which is of especial consequence where the testator signs his will and then seeks out witnesses afterwards. The old Statute of Frauds required witnesses to attest and subscribe the will; which was interpreted to mean, that the testator was not obliged to sign in the presence of the witnesses, provided he made before them a due acknowledgment of the instrument; and, furthermore, that a due acknowledgment in fact did not necessitate his acknowledging in words that the instrument was his will, nor apprising the witnesses in any way of the nature or contents of the instrument they were called upon to attest.<sup>5</sup> But the Statute of Victoria uses a different

the act of Victoria than that of Charles II; yet they vary quite as widely in details as do these two English enactments, and the latest tendency conforms more to the Statute of Victoria or that of the New York code, which is somewhat similar. Local statutes should be carefully consulted whenever such questions arise. A contrast of the Massachusetts and New York codes affords a good example of our modern variety of expression. In Massachusetts the course taken was to apply the Statute of Frauds concerning devises to wills of both real and personal property. See 15 Pick. 393.

<sup>1</sup> Acts 1 Vict. c. 26, and 29 Car. II, c. 3, § 5, cited preceding section. Under the old Statute of Frauds three was the number for a devise.

<sup>2</sup> See local codes. Cf. also for late statutory changes, Stimson's Am. Stat. Law, § 2644. See 80 Va. 293. As to holograph wills dispensing with attestation, see *supra*, 255. And see 75 N. E. 1020, 218 Ill. 458; 70 P. 586, 65 Kan. 621.

<sup>3</sup> *Gay v. Sanders*, 101 Ga. 601, 28 S. E. 1019; 89 Ga. 490, 15 S. E. 643; 88 S. W. 484. And see 32 Fla. 18, 13 So. 451; 80 Va. 293; 50 S. E. 954, 123 Ga. 53 (devise and will of personalty different).

<sup>4</sup> 192 Penn. St. 263, 43 A. 1030; 45 So. 465 (La. 1908).

<sup>5</sup> A testator's declaration before three witnesses that the instrument produced and already signed by him was his will, was equivalent to signing it before them. *Ellis v. Smith*, 1 Ves. Jr. 11; *Casement v. Fulton*, 5 Moore P. C. 138. And more than this, though he merely asked the witnesses to sign, as such, the paper he produced which bore his signature, and they did so, neither seeing his signature nor knowing what was the nature of the instrument thus attested, the statute, nevertheless, was satisfied; supposing of course that this whole transaction imported consistently the full testamentary intent on his part. *British Museum v. White*, 6 Bing. 310; 7 Bing. 457; 1 Rob. 14; *Gaze v. Gaze*, 3 Curt. 451.

language. The execution here prescribed makes "the signature," and not, as before, "the will," the subject of acknowledgment in presence of the witnesses. A stricter rule of construction has arisen in consequence.<sup>1</sup> The acknowledgment of which we speak is the permitted substitute for signing in presence of the witnesses.<sup>2</sup>

322. Where all appears regular on the face of the will a due attestation should be presumed; and direct evidence that the name of the testator was visible on the face of the will when it was produced for witnesses to sign is not necessary.<sup>3</sup>

323. In our American States, a corresponding variance of statute expression calls for variance in interpretation. Subject, however, to the language and policy of each local enactment, we may say that the broad American principle requires the testator either to sign or acknowledge before his attesting witnesses.<sup>4</sup> In the latter instance, is it the acknowledgment of his will or the acknowledgment of his signature that the local statute keeps in view? To this inquiry let us direct our attention: first of all observing, that if due acknowledgment be made before the witnesses, the testator need not sign his will in their presence.<sup>5</sup>

<sup>1</sup> The result of the latest English cases appears to establish: (1) That the testator sufficiently acknowledges his signature, where he produces the will, with his signature visibly apparent on its face, and requests the witnesses to subscribe it; (2) but not where the witnesses neither saw nor could have seen the signature, especially if he did not explain the instrument to them. 1 Wms. Exrs. 88; 1 Jarm. Wills, 88; Swinford's Goods, L. R. 1 P. & D. 630; Gunstan's Goods, 7 P. D. 102; L. R. 1 P. & D. 378. And stress being here laid upon the signature, the main requirement is that the witnesses saw or might have seen it, as written by the testator consistently with the full and *bona fide* intent on his part of executing his will then and there. See Inglefant v. Inglesant, L. R. 3 P. & D. 172, as to the case where signature is visibly apparent and actual acknowledgment is less needful; 1 Jarm. Wills, 108, 109.

<sup>2</sup> The testator (or the person in his presence and by his direction) should sign first the witnesses afterwards; if the testator signs in presence of both or all the witnesses, that is enough; but where his signature was already on the paper when a witness was asked to sign, the sufficiency of his acknowledgment must be considered. It is decidedly preferable that a testator should avoid such nice controversy, by bringing the witnesses all into his presence together and then signing his will before them.

<sup>3</sup> Wright v. Sanderson, 9 P. D. 149; 347, *post*.

For latest cases, where circumstances are considered, see Huckvale's Goods, L. R. 1 P. & D. 375; Gunstan's Goods, 7 P. D. 102; Daintree v. Butcher, 13 P. D. 102, 107; (1893) P. 5; (1902) Prob. 3 (insufficient).

<sup>4</sup> It should be borne well in mind that neither the English Statute of Frauds, nor an American code which copies it, requires a testator to sign in the presence of the witnesses, but only that the witnesses shall sign in the presence of the testator.

<sup>5</sup> There are numerous decisions which establish the principle for this country, as in England, that acknowledgment is a sufficient substitute for signing in the presence. See 17 Ark. 292; Webster v. Yorty, 62 N. E. 907, 194 Ill. 408; Claflin's Will, 50 A. 815, 73 Vt. 129, 87 Am. St. Rep. 693; Stirling v. Stirling, 64 Md. 138, 21 A. 273; Webb v. Fleming, 30 Ga. 808, 76 Am. Dec. 675; Reed v. Watson, 27 Ind. 443; Crowley v. Crowley, 80 Ill. 469; Sechrest v. Edwards, 4 Met. (Ky.) 163; Chase v. Kittredge

324. In Massachusetts and various other States the language of the Statute of Frauds is essentially followed; and accordingly the acknowledgment prescribed for a testator relates simply to the will and its attestation.<sup>1</sup> But there are States whose courts depart from the liberal policy in this respect.<sup>2</sup>

325. In New York, on the other hand, and in various American States, the local code contemplates an acknowledgment of the "signature," as under the English Statute of Victoria. Four essentials are prescribed by the New York legislature, one of which is the making of the subscription in the presence of each of the attesting witnesses, "or an acknowledgment of the making of the same

11 Allen, 49, 87 Am. Dec. 687; *Cravens v. Faulconer*, 28 Mo. 19; *Roberts v. Welch*, 46 Vt. 154; *Parramore v. Taylor*, 11 Gratt. 220; 11 Phila. 161; *Smith v. Holden*, 58 Kan. 535, 50 P. 447; *Canada's Appeal*, 47 Conn. 450; *Convey's Will*, 52 Iowa, 197, 2 N. W. 1084; *Welch v. Adams*, 63 N. H. 344; 56 Am. Rep. 521. The New York code provides for the sufficiency of either a subscription in presence of the witnesses, or an acknowledgment to them. *Lewis v. Lewis*, 11 N. Y. 220.

But local codes are not found uniformly flexible in this respect. Thus the Alabama statute, now or formerly, favors only wills of personalty in this respect. *Henry, Ex parte*, 24 Ala. 638. And as to the New Jersey code, cf. 2 Green Ch. 625 and 8 C. E. Green, 507.

<sup>1</sup> Thus, it is held, agreeably with the English line of precedents under that statute, that a testator's acknowledgment in fact is sufficient, without any particular words importing the nature or contents of the instrument. That any act which clearly indicates his intentional acknowledgment is sufficient, without any language whatever. *Allison v. Allison*, 46 Ill. 61, 92 Am. Dec. 237; 67 P. 737 (Or. 1902). That the will may have been properly acknowledged by him, even though the attesting witnesses derive no clear idea whether the paper they subscribe is a will or some other kind of instrument. 11 Cush. 532, 59 Am. Dec. 155; 10 Met. 56, 43 Am. Dec. 414; *Ela v. Edwards*, 16 Gray, 91; 13 Gray, 110; 102 Mo. App. 308, 74 S. W. 423; 75 Vt. 19, 52 A. 1053; 129 Ga. 92, 58 S. E. 702; 219 Penn. 355, 68 A. 953; 34 Me. 162; 30 Gratt. 56; 32 Am. Rep. 650; 52 Iowa, 662, 3 N. W. 734; 108 Ala. 366, 18 So. 831; *Turner v. Cook*, 36 Ind. 129; 34 Ind. 275; *Canada's Appeal*, 47 Conn. 450; *Flood v. Pragoff*, 79 Ky. 607. See *per curiam* in *Canada's Appeal*, ib.; *Robinson v. Jones*, 105 Md. 62, 65 A. 814; *Turner v. Cook*, ib. And that, if the execution be *bona fide*, it matters not whether the witnesses saw the testator's signature or not. *Ela v. Edwards*, 16 Gray, 91; 1 Met. 359. Especially does this doctrine hold good where a witness might have seen the signature, and it was through no fault of the testator that he did not, but rather because of his own inadvertence. See also *Barry's Will*, 76 N. E. 577, 219 Ill. 391. In all matters of this character clear and explicit acts are to be regarded, rather than mere form, and presumptions favor where all appears regular. See *Allen v. Griffin*, 69 Wis. 529, 35 N. W. 21; *supra*, 322. But a genuine testamentary intention should exist. 72 N. E. 499, 187 Mass. 120, 105 Am. St. Rep. 386.

<sup>2</sup> Thus, while acknowledgment of the will by the testator may take the place of subscription in presence of the witnesses, it is held that subscribing witnesses to a will must subscribe as intending a testamentary execution; and hence they must know the character of the act they are to perform, and that the instrument was a will. *Roberts v. Welch*, 46 Vt. 164; *Grimm v. Tittmann*, 113 Mo. 56, 20 S. W. 664. Finally, in South Carolina, under a peculiar act, the courts have refused to sustain a will where the testator's acknowledgment was not brought clearly home to the subscribing witness. *Tucker v. Oxner*, 12 Rich. 141; *Gable v. Rauch*, 50 S. C. 95, 27 S. E. 555.

to them."<sup>1</sup> Similar enactments may be found in New Jersey and some other States.<sup>2</sup>

326. **Statutes of New York and New Jersey prescribe expressly another essential, not usually embraced under our local wills acts: namely, that the testator shall, at the time of making or acknowledging his subscription, declare that the instrument subscribed is his last will and testament.**<sup>3</sup> Such a requirement at once repels the theory that an attestation can be legally sufficient where the testator does not distinctly apprise his witnesses of the character of the paper which they are called in to subscribe.<sup>4</sup>

<sup>1</sup> *Lewis v. Lewis*, 11 N. Y. 220, 223. Under this enactment it is held an insufficient acknowledgment of the testator's subscription where the paper was so folded when the witnesses signed their names that they could not see whether it was subscribed by him or not, the language of acknowledgment leaving them further to infer that it might have been a deed instead of a will. 11 N. Y. 220. And see *Sisters of Charity v. Kelly*, 67 N. Y. 409; 77 N. Y. 596; 96 N. Y. S. 729.

<sup>2</sup> *Ludlow v. Ludlow*, 35 N. J. Eq. 480, 487; 66 A. 583; *Luper v. Werts* (Or.), 1890. Under none of the codes, English or American, as we apprehend, is it essential to due acknowledgment that the testator who produces the will with his name upon it for their attestation, should state in so many words that this is his signature. 3 Curt. 172, 175; *Tilden v. Tilden*, 13 Gray, 110; *Adams v. Field*, 21 Vt. 256; 4 Greenl. 220, 16 Am. Dec. 253; *Denton v. Franklin*, 9 B. Mon. 28; *Green v. Crain*, 12 Gratt. 552; *Allison v. Allison*, 46 Ill. 61, 92 Am. Dec. 237; *Gamber's Will*, 104 N. Y. 476; *Reed v. Watson*, 27 Ind. 443; *Baskin v. Baskin*, 36 N. Y. 416; *Alpaugh's Will*, 8 C. E. Green, 507; *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113.

<sup>3</sup> *Lewis v. Lewis*, 11 N. Y. 220, 223; *Clark v. Clark*, 52 A. 225 (N. J. 1902); 35 N. J. Eq. 480; 36 N. Y. 416. See also the California rule, as applied in *Myrick* (Prob.) 40. And see provision in the Louisiana code construed in *Bourke v. Wilson*, 38 La. An. 320; 31 So. 64, 106 La. 442 (before a notary).

<sup>4</sup> *Sisters of Charity v. Kelly*, 67 N. Y. 409. It is seen that this specific declaration is not the substitute for signing in presence, but accompanies the final execution of the will under all circumstances. A declaration before the witnesses in express terms that the instrument is one's last will best satisfies this statute requirement; but less than this is considered acceptable, provided that, in some way, the testator makes this fact known by acts or conduct, or, better still, by words. Such is the liberal construction placed by New Jersey courts upon the statute in question. 2 McCart. 290; *Ayres v. Ayres*, 43 N. J. Eq. 565, 12 A. 621; 63 N. J. Eq. 142, 51 A. 775; 50 N. J. Eq. 725, 742, 26 A. 673, 676; 51 N. J. Eq. 241, 27 A. 465; 56 N. J. Eq. 761, 40 A. 438.

This same general conclusion the latest New York decisions appear to have reached. See *Lane v. Lane*, 95 N. Y. 494. The New York cases are very numerous which construe this "declaration" phrase of the statute. See *Lewis v. Lewis*, 11 N. Y. 220; 52 N. Y. 125; 62 N. Y. 634; numerous cases cited in 95 N. Y. 499. Cf. *Mitchell v. Mitchell*, 77 N. Y. 596, where there was not considered a sufficient attestation; 3 Redf. (N. Y.) 181; 4 Redf. 244; 1 Dem. 496. And see 49 N. Y. Supr. 434; 52 N. Y. Supr. 1; 51 N. Y. Supr. 571; *Voorhis, Re*, 125 N. Y. 765, 26 N. E. 935. Whether signing or acknowledgment shall precede the declaration, or *vice versa*, is of no practical consequence, so long as they are essentially contemporaneous. *Jackson v. Jackson*, 39 N. Y. 162. But in order to satisfy the statute, the declaration before the attesting witnesses must be unequivocal, whether expressed by words or signs, and the witnesses must know from the testator that the document is a will. 11 N. Y. 226; 110 N. Y. 611, 615, 6 Am. St. Rep. 409, 18 N. E. 433. And see 66 P. 925 (Cal.).

In this respect the above enactments differ materially from the English statute of 1 Vict. c. 26; for that statute expressly dispenses with publication of the will by the testator, as a distinct act in the presence of the attesting witnesses. See § 13 of this

327. **Simultaneous presence of the witnesses at the making or acknowledgment** of the testator's signature is required in England, under the Statute of Victoria,<sup>1</sup> whereas the old Statute of Frauds permitted the testator either to sign before one or two witnesses and acknowledge the will before the others, or to acknowledge the will before all the witnesses separately without signing in the presence of any of them.<sup>2</sup> American codes will, on inspection, be found to vary on this point.<sup>3</sup>

328. **Subscription of the will by the testator after one or both of the witnesses** have signed their names to it is not a due execution. Such is the English rule on the subject under the Statute of Victoria;<sup>4</sup> this enactment intending that the testator shall make or acknowledge his signature (not his will) before either of the witnesses signs, and, of course, while both are present. There are a few American States where a different rule of local construction appears to have been adopted; but on the whole the preponderance of American authority discountenances the subscription of wit-

act. Nor under the statute of Car. II, which required the testator to sign, was publication concluded an essential, by the later cases. *Moodie v. Reid*, 7 Taunt. 361, *contra* *Ross v. Ewer*, 3 Atk. 156; 4 Ad. & El. 14; 9 Ad. & El. 936. Indeed, the long established doctrine, both of England and the United States, is that, independently of an express statute requiring publication, a will may be duly executed by a testator without any formal announcement of a testamentary purpose. See *supra*, 321, 324 and cases cited.

Publication is the act of declaring the instrument to be the last will of the testator; and the words "publish" or "declare" may conveniently be distinguished from the "acknowledging" of which we have spoken, a term quite commonly employed in wills acts with the lesser and limited application. See Bouv. Dict. "Publication"; 26 Wend. 325, approved in *Lane v. Lane*, 95 N. Y. 498 ("declare"). But a well-drawn attestation clause usually begins, "Signed, sealed, published, and declared," etc.; and it is undoubtedly prudent and natural, even if unnecessary, for the testator to make formal publication before the witnesses at the time they attest.

<sup>1</sup> L. R. 1 P. & D. 143; L. R. 3 P. & D. 169; Stat. 1 Vict. c. 26, § 9. And see *Wyatt v. Berry*, (1893) P. 5.

<sup>2</sup> 2 Ves. 455; 7 Bing. 457; 3 P. Wms. 253; *Addy v. Grix*, 8 Ves. 504. But Stat. Vict. c. 26 does not positively require the witnesses to subscribe and attest in each others presence.

<sup>3</sup> Many American enactments adopt the view that simultaneous attestation is not necessary. *Willis v. Moot*, 36 N. Y. 486; 107 N. Y. S. 222; 98 N. Y. 267; *Welch v. Adams*, 63 N. H. 344, 56 Am. Rep. 521; *Rogers v. Diamond*, 13 Ark. 474; *Ela. v. Edwards*, 16 Gray, 91; 11 Allen, 49, 87 Am. Dec. 687; *Webb v. Fleming*, 30 Ga. 808, 76 Am. Dec. 675; *Flinn v. Owen*, 58 Ill. 111; *Johnson v. Johnson*, 106 Ind. 475, 55 Am. Rep. 762, 7 N. E. 201; *Cowan v. Shaver*, 95 S. W. 200, 197 Mo. 203; *Hull's Will*, 89 N. W. 979, 117 Iowa, 738, 52 A. 222; 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280; 64 Md. 138, 21 A. 273. Under several of our codes, however, the legislative expression imports that the witnesses must subscribe their names in presence of each other. See *Roberts v. Welch*, 46 Vt. 164; 42 Vt. 658, 1 Am. Rep. 359; *Lane's Appeal*, 57 Conn. 182, 14 Am. St. Rep. 94, 4 L. R. A. 45, 17 A. 926. And this is altogether the preferable course to pursue in practice, under any circumstances, in order to make the proof for establishing the will as clear as possible.

<sup>4</sup> 3 Curt. 117, 243, 648; *Charlton v. Hindmarsh*, 1 Sw. & Tr. 433; 8 H. L. Cas. 160. 1 Wms. Exrs. 90.

nesses to a will prior to that of the testator.<sup>1</sup> But if the subsequent acknowledgment by a witness of his signature placed upon the will out of the testator's presence is not relied upon, nor a signing out of his presence at all, and the signing of witnesses and testator was essentially contemporaneous and fulfilled the statute in all other respects, our courts do not so readily condemn the will because the true sequence of signing happens casually to be reversed;<sup>2</sup> some witness taking up the pen out of turn and before the testator. For here, it may be said, there is but a trivial variation of formal facts in one complete and consistent transaction; and the policy whose aim it is to prevent the possibility of fraud in procuring the names of witnesses can suffer no infringement.<sup>3</sup>

<sup>1</sup> See this subject exhaustively examined by Gray, J., in *Chase v. Kittredge*, 11 Allen, 49, 87 Am. Dec. 687, with English and American citations; *Reed v. Watson*, 27 Ind. 443; *Duffie v. Corridon*, 40 Geo. 122; 87 Ga. 379, 14 L. R. A. 160, 13 S. E. 712; *Jackson v. Jackson*, 39 N. Y. 153; *Lane v. Lane*, 54 S. E. 90, 125 Ga. 386, 114 Am. St. Rep. 207.

The theory here favored is, that while the local statute leaves the testator free either to sign out of their presence and acknowledge before the witnesses or to sign in their presence at his discretion, they, on their part, have no option but to attest and subscribe in his presence, and they cannot acknowledge a signature before him in return. Hence, it is held under the English statute that where one of the two witnesses subscribes his name to the will before the testator has made or acknowledged his own signature in presence of both, and the other witness then subscribes alone, it is not a legal compliance that the first witness should afterwards acknowledge his premature signature; but either he must re-subscribe, or the will fails of its essential subscription and attestation. *Moore v. King*, 3 Curt. 243; 1 Rob. 775; 2 Rob. 311. And see 2 Curt. 865; 3 Curt. 659; *Hindmarsh v. Charlton*, 8 H. L. Cas. 160; *Wyatt v. Berry*, (1893) P. 5; *Irvine's Estate*, 55 A. 795, 206 Penn. 1 (invalid where one witness signed before testator and the other did not know whether testator had signed). This position is reinforced in New York practice by the consideration that under the peculiar legislation of that State, attesting witnesses are, by this act of signing their names, to attest not only the testator's signing or acknowledgment but his contemporaneous declaration that it is his will. *Supra*, 326; *Jackson v. Jackson*, 39 N. Y. 153, 161, *per* Woodruff, J.

On the whole, it does not seem to affect the legal objection that a local statute follows the language of the old Statute of Frauds rather than that of Victoria, in prescribing the formalities of attestation. And what we should here particularly observe is that witnesses are required under both of these enactments, not only to attest the will, but to subscribe it "in presence of" the testator; for which reason a subscription of his name prematurely by a witness while the testator is absent, is especially obnoxious to the requirement, and cannot be cured by an acknowledgment afterwards in the testator's presence without a re-subscription. *Chase v. Kittredge*, 11 Allen 63, 87 Am. Dec. 687, and cases cited; *Reed v. Watson*, 27 Ind. 443; *Duffie v. Corridon*, 40 Geo. 122; *Pawtucket v. Ballou*, 15 R. I. 58, 2 Am. St. Rep. 868, 23 A. 43. *Contra*, *Sturdivant v. Birchett*, 10 Gratt. 67; 11 Gratt. 220. Cf. *Moale v. Moale*, 59 Md. 510, 519.

<sup>2</sup> 40 S. E. 689, 130 N. C. 1, 89 Am. St. Rep. 854, 57 L. R. A. 209; *Gibson v. Nelson*, 54 N. E. 901, 181 Ill. 122, 72 Am. St. Rep. 254.

<sup>3</sup> *Miller v. McNeill*, 35 Penn. St. 217; *O'Brien v. Gallagher*, 25 Conn. 229; *Shafter's Estate*, 85 P. 688 (Col. 1906); *Lacey v. Dobbs*, 47 A. 481, 61 N. J. Eq. 575; *Upchurch v. Upchurch*, 16 B. Mon. 113; *Vaughan v. Burford*, 3 Bradf. 78; *Kaufman v. Caughman*, 49 S. C. 159, 61 Am. St. Rep. 808. Other cases seek that result by discrediting the evidence of witnesses themselves on this point. 21 Hun, 383. *Contra*, 50 A. 467,

329. The request that witnesses should attest and subscribe one's will may be inferred from acts and conduct of the testator as well as his express words; the law regarding substance rather than literal form in such matters. It is not essential, therefore, that the testator should expressly ask a subscribing witness to attest his will.<sup>1</sup> Indeed, the active part in procuring the witnesses and requesting them to attest and subscribe is not unfrequently borne by some friend, near relative or professional counsel; and if such third person acts truly and honestly for the testator in his conscious presence and with his apparent consent, the legal effect is the same as though the testator himself had spoken and directed the business.<sup>2</sup>

330. The words "attest" and "subscribe" under local statutes in this connection should be distinguished.<sup>3</sup> By attestation we signify the act of witnessing in its full legal import; by subscription, the

55 L. R. A. 580, 63 N. J. Eq. 321; *Marshall v. Mason*, 57 N. E. 340, 176 Mass. 216, 79 Am. St. Rep. 306.

Some American statutes are not so expressed as to require a signing "in the testator's presence." See 11 Allen, 61, 87 Am. Dec. 687, and citations.

"The general and regular course undoubtedly is, for the testator in the first place to sign and execute the will on his part, and then call upon the witnesses to attest the execution by subscribing their names." *O'Brien v. Gallagher*, 25 Conn. 229.

Moreover, it is fair to presume, in absence of clear proof to the contrary, that the testator signed first and his witnesses afterwards, as they should and would naturally have done. *Allen v. Griffin*, 69 Wis. 529; 49 S. C. 159, 61 Am. St. Rep. 808; *Peeverett's Goods*, (1902) Prob. 205.

<sup>1</sup> *Coffin v. Coffin*, 23 N. Y. 9, 80 Am. Dec. 235; 3 Bradf. 295; *Higgins v. Carlton*, 28 Md. 117, 92 Am. Dec. 666; *Rogers v. Diamond*, 13 Ark. 474; *Myrick Prob.* 50; *Allen's Will*, 25 Minn. 39. His acts, his gestures, may signify this request; whatever, in fact, implies his knowledge and free assent thereto. *Allison v. Allison*, 46 Ill. 61, 92 Am. Dec. 237; *Savage v. Bowen*, 49 S. E. 668, 103 Va. 540; 46 A. 993, 91 Md. 383; 57 S. W. 526, 157 Mo. 1, 80 Am. St. Rep. 604; 2 Bradf. 295; 2 Robert. 337.

<sup>2</sup> *Inglesant v. Inglesant*, L. R. 3 P. & D. 172; 52 N. Y. 125; 27 N. Y. 9, 84 Am. Dec. 220; *Bundy v. McKnight*, 48 Ind. 502; *Cheatham v. Hatcher*, 30 Gratt. 56, 32 Am. Rep. 650; *Meurer's Will*, 44 Wis. 392; 87 Ind. 13; *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113; *Nelson's Will*, 141 N. Y. 152, 36 N. E. 3; *Leonard, Ex parte*, 39 S. C. 518, 22 L. R. A. 302, 18 S. E. 216; *Denny v. Pinney*, 60 Vt. 524, 12 A. 108; *Burney v. Allen*, 34 S. E. 500, 125 N. C. 314, 74 Am. St. Rep. 637. For statute requirement of "request," see 23 N. Y. 9, 80 Am. Dec. 235.

Every prudent attorney who is called upon to take an active part in procuring the execution of a will, takes heed to elicit as far as possible, before the witnesses, the active interest and participation of the testator himself.

<sup>3</sup> "Attestation is the act of the senses; subscription is the act of the hand; the one is mental, the other mechanical; and to attest a will is to know that it was published as such, and to certify the facts required to constitute an actual and legal publication; but to subscribe a paper published as a will, is only to write on the same paper the names of the witnesses, for the sole purpose of identification. There may be a perfect attestation in fact without subscription." *Swift v. Wiley*, 1 B. Mon. 114, 117 *per curiam*. And see *Gerrish v. Nason*, 22 Me. 441, 39 Am. Dec. 589; *Reed v. Watson*, 27 Ind. 448; 1 Sw. & Tr. 439.

signing of one's name, which implies that this act has been performed.

331. **As to the witness, we now inquire what signing or subscription on his part will satisfy the statute.** The precedents adduced as to the testator's proper mode of signing may be interchanged considerably with those under the present head.<sup>1</sup> For a subscribing witness, like the testator himself, signs most appropriately by writing out his name boldly with pen and ink whenever he can do so, and yet does not sign thus invariably.<sup>2</sup>

332. **The identification of himself as the person actually attesting is implied in the signature of a witness, whatever shape that signature may take.** Hence, the use of a fictitious name, or the misspelling, variation or contraction of one's own name, or even a signature which describes instead of naming at all, may answer the purpose of the statute, provided the genuine intention of subscribing as a witness accompanied the act.<sup>3</sup> Nor is a marksman's signature, if of itself genuine, avoided by the circumstance that a wrong surname is written against it.<sup>4</sup>

333. **But where the signing or subscription was accompanied by an incomplete intention of subscribing as a witness, the statute is**

<sup>1</sup> *Supra*, 303-305.

<sup>2</sup> There is much more reason why a testator who knows how to write should yet be found incapable of doing so unassisted at the execution of the will, than any of his subscribing witnesses, and hence be permitted to make his mark, use a stamp, sign by initials, or suffer his hand to be guided over the paper, with the full force and effect of a regular signature *animo testandi*. Witnesses, being chosen from society at large, whereas the testator himself is frequently sick and in apprehension of death when his will is executed, are best chosen from the intelligent and able-bodied. Nevertheless, a witness may lawfully subscribe a will by mark. *Ashmore's Goods* 3 Curt. 756; 13 Ired. 259; 6 Humph. 92; *Thompson v. Davitte*, 59 Ga. 472; *Osborn v. Cook*, 11 Cush. 532, 59 Am. Dec. 155; *Lord v. Lord*, 58 N. H. 7, 42 Am. Rep. 565; 10 Paige, 85, 40 Am. Dec. 225 (statute). Or by initials. 2 Rob. 110; 1 Redf. Wills, 229; 1 Jarm. Wills, 82; 96 Ga. 1, 51 Am. St. Rep. 121, 30 L. R. A. 143, 23 S. E. 107. But see 1 Hill Ch. 265. And probably by a stamp or device, especially if illiteracy or some other consistent reason may be given for it. See 3 Curt. 117. If the witness cannot write without assistance, his hand may be guided over the paper by another. 3 Q. B. 117; 4 Jur. N. S. 288. Initials, a signature with a guided hand, or a cross-mark around which some one else writes the name of the witness before or afterwards,—all these are modes of signing by the party himself, and not by another. *Supra*, 303-308; *Garrett v. Heflin*, 98 Ala. 615, 39 Am. St. Rep. 89, 13 So. 326. It is only needful that the witness should have intended to denote on his part the full and deliberate act of a legal attestation and to have performed by his own hand a subscription accordingly.

But the mark of the witness must be duly proved. 59 Ga. 472; 1 Harr. & J. 399. And it is certainly inadvisable to have witnesses who sign by mark, device, etc., where a testator can possibly avoid it, for it invites litigation.

<sup>3</sup> See 2 Spinks, 57; 29 L. J. Prob. 114; *Sperling's Goods*, 3 Sw. & Tr. 272.

<sup>4</sup> *Ashmore's Goods*, 3 Curt. 756. But cf. *Walker's Estate*, 110 Cal. 387, 52 Am. St. Rep. 104, 30 L. R. A. 460, 42 P. 815.



not satisfied.<sup>1</sup> Nor, again, is the statute satisfied where the signature relied upon, whether imperfect or in full, was placed upon the paper without the corresponding *bona fide* intention of subscribing as an attesting witness.<sup>2</sup>

334. In short, the subscription by a witness, in order to be good, must have been made freely and understandingly, *animo attestandi*. One who writes his name with a different intent or under some constraint which deprives him of his free agency cannot be regarded in the legal sense, as a subscribing witness at all.<sup>3</sup>

335. Our general statute law insists upon no particular place of subscription for witnesses; though the usual and proper place is below an attestation clause, if there be one, otherwise at the left of the testator's signature, as in deeds and other attested documents.<sup>4</sup> When the will contains no regular attestation clause, it is customary and proper to use some such expression as "witness," "attest," "in the presence of," or "signed and acknowledged before," by way of briefly attesting and showing why the names are placed there. These expressions, though convenient certainly, are not indispensable.<sup>5</sup>

<sup>1</sup> As where one of the witnesses, through feebleness, finds himself unable to complete his signature after writing his Christian name, and a substitute is called in. *Mad-dock's Goods*, L. R. 3 P. & D. 169. See *Myrick Prob.* 124.

<sup>2</sup> E.g., where initials were placed on the will, not with the subscribing purpose, but merely to note alterations. 29 L. J. Ch. 71; 1 Rob. 712. See 80 Va. 293. Or generally in case of a signature, fraudulently or surreptitiously procured, and affixed. See *Hind-marsh v. Charlton*, 8 H. L. Cas. 160; 345 *post*; 29 L. J. Prob. 114.

<sup>3</sup> L. R. 1 P. & D. 259, 277. But a person who signs the paper with another purpose in view may have intended his signature to serve for attestation as well. *Griffiths v. Griffiths*, L. R. 2 P. & D. 300 (where one witness signed "A. B., Executor"); *Payne v. Payne*, 54 Ark. 415, 16 S. W. 1.

Where another and a superfluous name is written among those of the subscribing witnesses, without any intention of attesting, it may be omitted from the probate. *Sharman, Re*, L. R. 1 P. & D. 661.

As a safeguard against fraud or error, erasures or interlineations made in the instrument before signing are properly noted in the attestation by the witnesses, especially if important ones. See 6 Dem. 162; 298a, *supra*.

<sup>4</sup> But in determining whether persons have subscribed a will, actually and intentionally as attesting witnesses, the position of their signatures may prove material in a controversy. See *Wilson's Goods*, L. R. 1 P. & D. 269 (a strange and unusual place and witnesses dead). The proof may overcome presumptions. *Streatley's Goods*, (1891) P. 172.

<sup>5</sup> Witnesses subscribe sufficiently, whenever they see the will executed by the testator, and proceed at once to sign their names on any part of it, with the intention of attesting it, and this whether explanatory words are placed on the paper or not. They need not sign near the testator, nor even near one another. *Roberts v. Phillips*, 4 E. & B. 450; 1 P. & D. 433; 5 Redf. 20; *Moale v. Cutting*, 59 Md. 510 (above attestation words); *Potts v. Felton*, 70 Ind. 166; 39 Miss. 214; *Franks v. Chapman*, 64 Tex. 159. And see *Akers's Will*, 66 N. E. 1103, 173 N. Y. 620 (at side sufficient under stat ute); 29 So. 98, 127 Ala. 640. This rule is liable, however, to statute variance and direction.

336. **Attestation or subscription by witnesses must be on the same sheet of paper as that which contains the testator's own signature, or else upon some paper physically connected with that sheet.**<sup>1</sup>

337. **Concerning the attestation of wills written on several sheets most statutes are silent.**<sup>2</sup> And the rule which consequently applies is that established under the Statute of Frauds; namely, that if the will be written on several sheets, whether fastened together or not, and the last sheet alone is attested in form, the whole will is well executed, provided all the sheets were on hand in the room.<sup>3</sup> It is simply the later interpolation of sheets not actually attested by them, or a subtraction, which the law still guards against under these circumstances; for execution, whether by testator or witnesses, should receive its intended scope and no more.<sup>4</sup>

338. **Between the words "signing" and "subscribing," as used by legislatures in the present connection, there seems to be no vital distinction.** When witnesses are required to perform the manual act of subscribing, they are called upon simply to make a valid

1 Duv. (Ky.) 126; 4 Dem. 124; 76 N. Y. S. 965; Conway's Will, 124 N. Y. 455, 11 L. R. A. 796 ("end of will"). And the foot of the will, in the vicinity of the testator's signature or just after an attestation clause, best avoids controversy.

<sup>1</sup> No particular mode of connection is prescribed by law; and hence the fastening by tape, by eyelets, by mucilage, or even by a pin, seems unobjectionable. Where papers, are thus connected, the testator may sign on one paper and the witnesses on another provided their intent corresponded. Braddock's Goods, 1 P. D. 433; Moore, *Re*, (1901) P. 44 (top of next page); Collins, *Re*, 5 Redf. 20 (attestation clause pasted at the end of the will). But attestation or a subscription by witnesses on a piece of paper, detached and separated from the will and the testator's signature, nor affixed in his presence to the paper at the time of execution, fails of compliance with the policy of our law: we may assume it to be void, as otherwise a door must be open to much fraud and perjury.

<sup>2</sup> Including the English Statute 1 Victoria.

<sup>3</sup> The Statute of Frauds did not require that all the sheets should have been seen by the witnesses. 3 Burr. 1773; 229 Ill. 115, 82 N. E. 275; 1 Sw. & Tr. 528; Rees v. Rees, L. R. 3 P. & D. 84; *Ela v. Edwards*, 16 Gray, 91; *Tonnele v. Hall*, 4 Comst. 140; *Wikoff's Appeal*, 15 Penn. St. 281, 53 Am. Dec. 597; *Gass v. Gass*, 3 Humph. 278. But under the policy of some later codes a more positive exhibition of the whole will in their presence may be insisted upon; and unquestionably, if the several pieces of paper are connected in their provisions and form a connected series, and are brought in this shape before the attesting witnesses at the time of their subscription, a single attestation will suffice for the whole. 16 Gray, 91, *supra*. See 146 N. C. 25, 59 S. E. 163 (strict rule).

<sup>4</sup> From this point of view, it is decidedly preferable that the sheets should be fastened together before execution at all, so that the integrity of the will may go undisputed; and yet this fastening of parts may follow the attestation, without invalidating the disposition. *Dea. & Sw.* 7; *Rees v. Rees*, L. R. 3 P. & D. 84; *Jones v. Habersham*, 63 Ga. 146. It is a question of fact in any case, whether, under all the circumstances, the sheets as presented for probate constituted the identical will as actually and intentionally executed. 1 Jarm. Wills, 84; 14 P. D. 49; 6 Dem. 262; cases *supra*.

signature in the same sense which applies to the testator, and not, as a literal construction might import, to "write under" him.<sup>1</sup>

339. **Whether another may sign for the subscribing witness** we now consider. English statutes do not permit this. Each witness must himself sign or subscribe *animo attestandi*, and the signature cannot be made by some other person for him.<sup>2</sup> In the United States this rule is not uniformly stated, and, in fact, the question was seldom raised until lately. But the doctrine, as generally assumed or expounded, denies, like that of the English cases, that a witness to a will signs or subscribes so as to satisfy the statute without some manual act on his part by way of attestation.<sup>3</sup> But there are States in which a different view is taken, namely, that the name of an attesting witness (especially if unable to write) may be written by another, at his request, in his presence and in the presence of the testator; even though this other person is himself one of the subscribing witnesses.<sup>4</sup>

<sup>1</sup> 1 Jarm. Wills, 82; *Moore v. King*, 3 Curt. 243; 4 E. & B. 450; 1 Wms. Exrs. 96. But, as already observed, legislation permits a testator to "make his signature" or "acknowledge" before the witnesses at his option, while directing witnesses to "subscribe" in return, without any such option. *Supra*, 321-325. And there remains still another distinction to observe: namely, that the testator may sign the will, either personally or "by some other person in his presence, and by his direction"; while witnesses are directed to sign without any such explicit admission of a substitute.

<sup>2</sup> 3 Curt. 243; 7 Jur. 205, 1045; 1 Jarm. Wills, 82. In *Leverington's Goods*, 11 P. D. 80, a wife's signature of the name of her husband, who was unable to write, was held an improper attestation. One witness cannot sign for another, though he may help out such other signature by guiding the hand, writing around a mark, etc. 3 Q. B. 117; 1 Sw. & Tr. 153; *Lewis v. Lewis*, 2 Sw. & Tr. 153.

<sup>3</sup> This theory is fortified by the recognized distinction that a witness cannot make acknowledgment of his signature as a testator may; and by the further omission of that statute option of signing by another which the local code, like that of England, expressly confers upon a testator. *Le Roy, Ex parte*, 3 Bradf. 227; *Riley v. Riley*, 36 Ala. 496; *Horton v. Johnson*, 18 Geo. 396; *Bush v. McFarland*, 94 Tenn. 538, 45 Am. St. Rep. 760, 27 L. R. A. 662, 29 S. W. 899. But one witness may guide the hand of another, or write a name about his mark, etc., as under the English rule, consistently with treating the latter as signing for himself. 2 Bradf. 96, 392.

<sup>4</sup> *Upchurch v. Upchurch*, 16 B. Mon. 102; *Jesse v. Parker*, 6 Gratt. 57, 52 Am. Dec. 102; *Crawford's Will*, 46 S. C. 299, 57 Am. St. Rep. 684, 32 L. R. A. 77, 24 S. E. 69; *Lord v. Lord*, 58 N. H. 73, 42 Am. Rep. 565; *Reaver's Appeal*, 54 A. 875, 96 Md. 735, 94 Am. St. Rep. 610; *Schnee v. Schnee*, 60 P. 738, 61 Kan. 643. Whenever a subscribing witness can sign for himself, being neither illiterate nor physically disabled, it seems the more objectionable that another should sign for him; and for the fellow-witness to affix such signature under any circumstances seems a more impolitic course than for some other party to do so who might himself have served in place of the one whose name he wrote. For in the latter case, the policy of requiring two (or three) attesting witnesses is essentially observed at all events; and by a very slight stretch of construction, the agent might be treated as himself an attesting witness who subscribes another name with *bona fide* intent and meaning to authenticate the instrument. But for any third party to so write out the signature of a witness for him that the latter makes no mark, takes no share in the attestation and has no means of identifying the paper to which his name was affixed, is highly objectionable, to say the least, and tempts to fraud. See *Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280.

340. Now as to signing or subscribing a will "in presence of" the testator. For in this provision our codes well harmonize, though seldom positive in declaring that witnesses shall sign in presence of one another. The English decisions as to what shall be considered "the presence" of the testator at the subscription are numerous, stretching over a space of four centuries and commenting without a break upon the earlier and later enactments of Charles II and Victoria, in both of which the same language is employed in this respect.<sup>1</sup> In the construction of this phrase it has been insisted that the testator must have personal cognizance of the act of signing by his witnesses.<sup>2</sup> Attestation fails of legal sufficiency whenever the testator, were he mentally capable of recognizing the act of subscription or not, was actually unconscious of it.<sup>3</sup>

341. But aside from the testator's mental consciousness of the act of attestation, which is always essential, these words "in presence of" the testator are inconsistent with his physical separation from the witnesses and the will at the scene of their attestation. One might issue directions or receive assurances while in a room not contiguous to his witnesses; or, indeed, in these modern days converse by wire between houses which were miles apart; but all this would be inconsistent with a subscription in bodily presence such as might enable the testator to keep in view the identity of the paper so subscribed. And so, too, is that "presence" equally desirable from the witness's own point of view. Contiguity, therefore, with an uninterrupted view between testator and subscribing witness or will is deemed essential to a physical signing in the testator's presence.<sup>4</sup>

<sup>1</sup> The design of the legislature in requiring witnesses to sign in presence of the testator was, as English authorities state, that the testator might have ocular or other bodily evidence of the identity of the instrument subscribed by them; and this design the courts have kept steadily in view, while fixing upon the legal sense of the word "presence." 1 Jarm. Wills, 86, 87; 1 Wms. Exrs. 92.

<sup>2</sup> Thus, if a testator, after having signed and published his will, and before the witnesses affix their signatures, falls into a state of insensibility or stupor (whether temporary or permanent), the attestation is not properly made. *Right v. Price*, Dougl. 241. Nor when the will is attested in a secret and clandestine manner, though the testator be present in the same room. *Longford v. Eyre*, 1 P. Wms. 740. Nor where the witnesses subscribe in the same room, or elsewhere, and the testator, who had signed some time previously, was not made aware of it. *Jenner v. Finch*, 5 P. D. 108. And see 1 Jarm. Wills, 87.

<sup>3</sup> Even though a statute should say nothing in express terms of subscribing "in his presence," we apprehend that the simple statute requirement of a subscription and attestation in addition to the testator's signature would justify the same legal conclusion.

<sup>4</sup> The subscription is not invalidated by not having been performed in the same room or even the same house, provided it took place within the testator's range of vision. As in a case where witnesses left the testator, who lay in bed in one room,

342. Our American rule adopts in the main the distinctions of these English cases, and the policy of such enactments is understood in the same sense: namely, to prevent substitution and fraud upon the testator. And an attestation made in the same room with the testator is treated as *prima facie* an attestation made in his presence; while an attestation made in another is *prima facie* not made in his presence; proof of the actual facts being admissible in either case to establish the contrary.<sup>1</sup>

and subscribed their names at a table in another room opposite, and in sight, through a passage, the doors between being thrown open. *Davy v. Smith*, 3 Salk. 395. And see 2 Salk. 688. Or where a testatrix sat in her carriage, and the will was attested in the attorney's office, but not out of her sight. *Casson v. Dade*, 1 M. & S. 294; 1 Bro. C. C. 99; 1 Deane, 259. Testator's ability to see is deemed here sufficient. On the other hand, no mere contiguity to the witnesses will constitute a "presence" within the act, if the testator's position be such that he cannot possibly see them sign. As where he occupies his bed-chamber, and the witnesses subscribe in an outer hall where they are necessarily hidden from his sight by an intervening flight of stairs. *Carth. 79*. And see *Norton v. Bazett*, Dea. & Sw. 259; 3 Curt. 118. Or where his position, which he cannot readily change, or his physical condition is such that the witnesses and will are in reality out of his sight. Cf. *Wright v. Manifold*, 1 M. & S. 29; 1 Deane, 259; 1 Curt. 914; 3 Curt. 118. As to a closed door, a bed curtain, or other slight obstruction, the test is whether the testator might easily have removed what interfered with or obstructed his vision of the act. Cf. 2 Curt. 320, and 1 Robert. 775. See *Wms. Exrs. 92*.

In fine, the true test as asserted in the English cases is not whether the testator saw the witnesses sign, but whether he might have seen them sign, considering his conscious mental and physical condition and his posture at the time of their subscription; and the result of the cases is to enjoin it carefully upon all those who are charged with the direction of such business, where the testator himself is weak and unable to move about freely, not to peril the validity of the will by any false delicacy about bringing witnesses and the sick person close together. *Trinnel's Goods*, 11 Jur. N. S. 248; *Kellick, Re*, 3 Sw. & Tr. 578.

<sup>1</sup> 1 Leigh, 6; *Mandeville v. Parker*, 31 N. J. Eq. 242, 252; *Lamb v. Girtman*, 33 Geo. 289; 7 Harr. & J. 61; 5 Mon. 199, 17 Am. Dec. 60; 56 N. J. Eq. 761, 40 A. 438. This seems likewise to be the English rule of presumptions in such cases.

In a few States, the code drops the direction of a signing "in presence of" the testator by the witnesses. This limits the doctrine of constructive presence. *Lewis v. Lewis*, 11 Kern. 220. See 5 Redf. N. Y. 316. See also 14 Ark. 675; 17 Ark. 292. And see *Leonard, Ex parte*, 39 S. C. 518, 22 L. R. A. 302, 18 S. E. 216.

Where, therefore, the witnesses sign the will in an adjoining room, out of the testator's sight as he lies on his bed, the statute fails of compliance, although the door between stands partly open. 31 N. J. Eq. 242; 7 Harr. & J. 61; 2 Cush. 433; 33 Ga. 289; 6 Ga. 539; *Mendell v. Dunbar*, 169 Mass. 74, 61 Am. St. Rep. 277, 47 N. E. 402. Cf. *Graham v. Graham*, 10 Ired. 219; 11 Ired. 632; *Sturdivant v. Birchett*, 10 Gratt. 67 (as to seeing witnesses but not the will). It is not enough to subscribe in the same room with the testator, where his relative situation forbids his perceiving the act. 1 Leigh, 6; 12 B. Mon. 619; *Reed v. Roberts*, 26 Ga. 294; 23 Ga. 441; *Downie's Will*, 42 Wis. 66; *Aikin v. Weckerly*, 19 Mich. 482. Indeed, to speak generally, if the testator be ill, unable to change his position readily for himself, or confined to his bed, his posture at the time of attestation should be such as to enable him to perceive his witnesses subscribe; and ability to perceive is here construed with some reference to his physical and mental condition at the time of subscription. 3 Jones, 202; 3 Harr. & M. 463; 1 Spears, 253, 40 Am. Dec. 599; *Maynard v. Vinton*, 59 Mich. 139, 26 N. W. 401, 60 Am. Rep. 276; *Witt v. Gardiner*, 158 Ill. 176, 49 Am. St. Rep. 150, 41 N. E. 781; 177 Ill. 43, 52 N. E. 368. It is not sufficient that the testator and the witnesses be present together if the testator appears utterly unconscious of their presence. *Chap-*

343. **Where the testator is blind, or of vision so impaired that he cannot see the act of subscription, the witnesses, it is sometimes said, must sign where, if able to see, the testator might have seen them.**<sup>1</sup> But the more natural statement appears to be that, if ocular cognizance by the testator is out of the question, however the incapacity may have arisen, the subscription should be made where he may take a genuine cognizance of the act by aid of his other senses.<sup>2</sup> At all events, the act should be performed in the conscious presence of the testator, and in such proximity to him that the bodily senses which he must needs rely upon may be used with fair advantage to ward off all deception.

344. **The certificate of acknowledgment usual in deeds is altogether superfluous in a will; but it may have the useful effect, provided all other formalities are consistent (though not otherwise), of converting the notary or magistrate himself into one of the subscribing witnesses.**<sup>3</sup>

*pell v. Trent*, 90 Va. 849, 19 S. E. 314. But if, while the attesting witnesses are subscribing, the testator, conscious of the act, is where by the mere act of volition he can witness the attestation, this constitutes a subscription in his presence, whether in the same room or not. *Meurer's Will*, 44 Wis. 392; 11 Ired. 632; *McElfresh v. Guard*, 32 Ind. 408; *Nock v. Nock*, 10 Gratt. 106; *Bundy v. McKnight*, 48 Ind. 502; *Ambre v. Weishaar*, 74 Ill. 109; *Pope v. Pickett*, 51 Ala. 584. And see *Allen's Will*, 25 Minn. 39; *Baldwin v. Baldwin*, 81 Va. 405, 59 Am. Rep. 669; *Ayres v. Ayres*, 43 N. J. Eq. 565, 12 A. 621; *Walker v. Walker*, 67 Miss. 529, 7 So. 491. If, close at hand, the testator enjoys normal health and may move about at pleasure, his change of place while they are signing will not be readily supposed to have deprived them of his presence. *Wright v. Lewis*, 5 Rich. 212, 55 Am. Dec. 714. Not only the corporeal presence of the testator is essential to the validity of an attestation, but his mental accompaniment of their subscription. *Watson v. Piper*, 32 Miss. 451; *Meurer's Will*, 44 Wis. 392; 2 Bradf. 244; 9 Penn. St. 54; 18 Ga. 40; *Jackson v. Moore*, 14 La. Ann. 213; *Etchison v. Etchison*, 53 Md. 348. Consciousness on his part may consist with an occasional stupor. 67 Miss. 529, 7 So. 491. And see *Bogent v. Bateman*, 65 A. 238 (N. J. 1906); *Calkins v. Calkins*, 75 N. E. 182, 216 Ill. 458, 1 L. R. A. (N. S.) 393 (insufficient where signed out of range of testator's vision, though shown to him and approved afterwards); *Healey v. Bartlett*, 59 A. 617, 73 N. H. 110; 63 N. E. 1021, 196 Ill. 484, 108 Am. St. Rep. 233 (will but not witnesses clearly in sight); 74 N. Y. S. 937; *Raymond v. Wagner*, 59 N. E. 811, 178 Mass. 315; *Burney v. Allen*, 34 S. E. 500, 125 N. C. 314, 74 Am. St. Rep. 637 (should be able to see both will and witnesses); 21 R. I. 533, 45 A. 551; 80 Minn. 180, 83 N. W. 58.

<sup>1</sup> *Piercy, Re*, 1 Robert. 278.

<sup>2</sup> *Ray v. Hill*, 3 Strobb. 297; *Fincham v. Edwards*, 3 Curt. 63; *Riggs v. Riggs*, 135 Mass. 238, 46 Am. Rep. 464. As most men can use their eyes when their wills are executed, vision is the usual and safest test of presence, but it is not the only one; for one may take note of the presence of another by his hearing or touch. *Morton, C. J.*, in *Riggs v. Riggs*, 135 Mass. 238, 241, 46 Am. Rep. 464. Here a testator's sense of vision had been affected by an injury. His sight was really unimpaired, but he was compelled to lie on his bed, looking upward, without turning his head. As he lay in this position, each instrument was in turn executed. *Cook v. Winchester*, 81 Mich. 581, 8 L. R. A. 822, 46 N. W. 106, of the same purport. And see 10 Gratt. 67; *Arneson's Will*, 107 N. W. 21, 128 Wis. 112.

<sup>3</sup> *Keely v. Moore*, 25 S. Ct. 169, 196 U. S. 38; 49 L. Ed. 376; *Murray v. Murphy*, 39 Miss. 214. But cf. *Hull's Will*, 89 N. W. 979, 117 Iowa, 738. A clerk of a court

345. Where a first attempt at executing a will fails through some informality, and a testator must go through the solemnity again with the same or other witnesses, care should be taken to conduct the new transaction with a scrupulous regard for all necessary forms, and to avoid the ready danger of fitting the first imperfect solemnities into the second, so that failure again follows imperfection.<sup>1</sup>

346. A formal attestation clause is no essential part of a will, but the instrument may be well executed without it.<sup>2</sup> Nevertheless, the use of an attestation clause, with full recital of the particulars usual in a careful execution, is highly to be commended; both as a guide in pursuing the formalities needful in so solemn a transaction, and for the sake, besides, of furnishing presumptive testimony that all has been rightly done, when subscribing witnesses are dead, forgetful, or beyond the reach of process. Nor matters it, that the execution, as thus recited, becomes more formal than the local statute insisted upon; for in simple details it is wiser to be needlessly particular than not particular enough.<sup>3</sup>

who witnesses a will does not affect its validity by attaching his official seal and certificate; at the same time he should have dispensed with it. 64 Tex. 159; *Payne v. Payne*, 54 Ark. 415, 16 S. W. 1.

Place of residence of witnesses is also a superfluous addition, though sometimes found useful. 68 A. 754.

<sup>1</sup> A witness who subscribes at the first attempt should resubscribe, if serving at the second; for as his acknowledgment of a former signature is not good, neither is it enough for him to retrace his former name with a dry pen instead of a wet one, nor even to change his first signature, with the purpose, not of rewriting, but completing it as first written. *Supra*, 338; 5 Moore P. C. 130; 1 Rob. 772; *Maddock's Goods*, L. R. 3 P. & D. 169; 2 Rob. 311; *Hindmarsh v. Charlton*, 8 H. L. Cas. 160. Where the testator indorses his will by way of ratifying its contents, but insufficiently for a re-execution, no attestation by witnesses to this endorsement can amount to an attestation of the will. *Patterson v. Ransom*, 55 Ind. 102. Cf. 5 Ind. 389; *Dixon's Appeal*, 55 Penn. St. 424. As to a testator's attempt to change his will after due execution, see *Treloar v. Lean*, 14 P. D. 49; L. R. 2 P. D. 602; Part IV, c. 1, *post*.

<sup>2</sup> It is sufficient, therefore, that the witnesses with attesting intent, subscribe under or against the word "witnesses," or use some other corresponding expression, or simply subscribe their names without any such expression at all. Stat. 1 Vict. c. 26, § 9; *Roberts v. Phillips*, 4 E. & B. 450; 10 Paige, 85; *Ela v. Edwards*, 16 Gray, 91; *Baskin v. Baskin*, 36 N. Y. 416; 11 Cush. 532, 59 Am. Dec. 155; 2 R. I. 88; *Olerick v. Ross*, 146 Ind. 282; *Berberet v. Berberet*, 131 Mo. 399, 33 S. W. 61, 52 Am. St. Rep. 634; 140 Ill. 649, 30 N. E. 683, 33 Am. St. Rep. 265; 77 N. Y. S. 643; *Hull's Will*, 89 N. W. 979, 117 Iowa, 738.

<sup>3</sup> A good form of attestation clause is as follows: "Signed [and sealed] by the said testator, as and for his last will and testament, in the presence of us, who at his request and in his presence, and in the presence of each other, have hereunto subscribed our names as attesting witnesses." This, it is perceived, recites some details useful on such an occasion, but not under most of our codes absolutely indispensable. As a statement of facts transpiring at the time when the will was executed, the attestation clause is useful as a memorandum to aid the attesting witnesses themselves in recalling the circumstances at the time of probate; besides indicating that whoever directed the execution understood what formalities were needful and saw them pursued. 4 E. & B. 457; 5 Redf. 624; *Tappen v. Davidson*, 27 N. J. Eq. 459; 16 Gray, 91; *Cottrell, Re*,

347. The advantage of an attestation clause with suitable recitals is shown in many of our decisions relating to the proof of wills, as evincing that the needful formalities were all complied with.<sup>1</sup> And though the attesting witnesses were all dead or beyond the reach of process, proof of their handwriting would in general make out a *prima facie* case of due execution, which, if aided by the recitals of a full attestation clause, would afford a very strong presumption, unless the contrary appeared on the face of the will.<sup>2</sup>

348. Subscribing witnesses are much relied upon to establish due execution of the will; nor can the testimony of persons accidentally present, who had nothing to do with the transaction, be entitled to equal consideration.<sup>3</sup> Though strangers personally to

95 N. Y. 329; *Hobart v. Hobart*, 154 Ill. 610, 45 Am. St. Rep. 151, 39 N. E. 581; 10 Paige, 85, 40 Am. Dec. 225. It is a wise precaution to read over the attestation clause to the witnesses in the testator's presence before they sign.

It is safer, where no attestation clause is used, for the witnesses to subscribe under or against some such word as "witness" or "attest" than to sign with no explanatory word at all, and thus widen the uncertain range of oral and extrinsic proof.

<sup>1</sup> With only a formal attestation clause on one side, and the testimony decidedly adverse of all subscribing witnesses on the other, probate of a will has been refused. *Croft v. Croft*, 4 Sw. & Tr. 10; *Woolley v. Woolley*, 95 N. Y. 231. But, with the aid of a proper attestation clause to contradict such persons, as possibly without it, wills have been established in proof, against the concurring statements of both subscribing witnesses or the statement of either, that the legal requirements of execution were not fully complied with. *Wright v. Rogers*, L. R. 1 P. & D. 678; *Cottrell, Re*, 95 N. Y. 329; *McCurdy v. Neall*, 24 N. J. Eq. 333, 7 A. 566; 154 Ill. 610, 45 Am. St. Rep. 151, 39 N. E. 581. And wherever witnesses fail to recollect and give no positive testimony, or cannot, both or all, be produced in court, the clearer the recitals of an attestation clause, the stronger becomes the presumption that the will was executed in all details as the law requires. 3 Sw. & Tr. 200; *Huckvale's Goods*, L. R. 1 P. & D. 375; *Cheatham v. Hatcher*, 30 Gratt. 56, 32 Am. Rep. 650; *Pepoon's Will*, 91 N. Y. 255. Of course imputations more serious than failure of memory may affect the credibility of a witness in some cases. See *Higgins's Will*, 94 N. Y. 554; *Moore, Re*, (1901) P. 44, 72 N. E. 128 (Ind. 1904); 59 A. 874 (N. J. 1905); 94 N. W. 705 (Neb. 1903).

<sup>2</sup> *Meurer's Will*, 44 Wis. 392; 77 N. Y. 369; 83 N. Y. 592; 41 N. J. Eq. 284, 7 A. 443; *supra*, 177, 178; 13 Gray, 110; *Vernon v. Kirk*, 30 Pa. St. 218; *Ela v. Edwards*, 16 Gray, 91; 10 Allen, 357; *Deupree v. Deupree*, 45 Ga. 415; *Barnes v. Barnes*, 66 Me. 286; *Kellum, Re*, 52 N. Y. 517; *Alpaugh's Will*, 23 N. J. Eq. 507; 10 Leigh, 13; 9 Rich. 133; *Robinson v. Brewster*, 140 Ill. 649, 33 Am. St. Rep. 265, 30 N. E. 683; *Bogart v. Bateman*, 65 A. 238 (N. J. 1906); *Arneson's Will*, 107 N. W. 21, 128 Wis. 112. Especially if a professional man attended the execution. 56 N. J. Eq. 761; 4 Redf. 165. Or the testator wrote out his own will. *Woodhouse v. Balfour*, 13 P. D. 2; 23 N. J. Eq. 507.

If a will appears on its face to be duly executed, the presumption is that all was rightly done even though the attestation clause omit to state some essential particular. 1 Wms. Exrs. 101; 1 Robert. 5. Or states wrongly. *Mason v. Bishop*, 1 C. & E. 21.

But in no case will the presumption of compliance with all statutory formalities arise unless the will appears on its face to have been duly executed; and any such presumption is rebutted by clear proof to the contrary. *Lee's Goods*, 4 Jur. N. S. 490 (forgery by testator). Insufficient attestation is not to be set up collaterally against a will admitted to probate. *Leatherwood v. Sullivan*, 81 Ala. 458, 1 So. 718.

<sup>3</sup> *Higgins's Will*, 94 N. Y. 554.



the testator, their concurring testimony alone may well establish the due execution in which they participated; and even in a conflict of evidence great weight is given to their several statements.<sup>1</sup>

349. As a formal attestation clause may be dispensed with, so may the formal recital in such a clause that the testator appeared at the time of execution of sound mind, and to have executed the instrument voluntarily and without compulsion. Recitals somewhat similar are sometimes prescribed, however, for the acknowledgment of a deed in specified instances; and the convenience of such a recital in a will is obvious where such facts are liable to challenge.<sup>2</sup>

350. With a brief statement of the qualification of witnesses to a will, we close the present chapter. The Statute of Frauds required that every devise of land should be attested by "credible" witnesses;<sup>3</sup> an epithet for which "competent" has been substituted in most of our American codes as more precise and definite,<sup>4</sup> while the Wills Act of Victoria drops the adjective altogether.<sup>5</sup>

<sup>1</sup> *Marx v. McGlynn*, 88 N. Y. 357. But as between such witnesses, one may from character, habits or surroundings, or disinterestedness, be more trustworthy than the other, where they disagree. See 4 Redf. 328; 50 S. C. 95, 27 S. E. 555; *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113; 173 Penn. St. 298, 33 A. 1100; *Cheetham v. Hatcher*, 30 Gratt. 56, 32 Am. Rep. 650; 62 Iowa, 163, 17 N. W. 456; 141 N. Y. 389, 36 N. E. 314. Nor is the probate of a will dependent on the recollection or veracity of any subscribing witness; but other pertinent testimony may be adduced though the subscribing witnesses be not all dead, non-resident, or insane, and even to contradict them. *Abbott v. Abbott*, 41 Mich. 540, 2 N. W. 810. Where subscribing witnesses cannot be found, other evidence will be admitted to prove signatures. 3 Redf. 74; *Beadles v. Alexander*, 9 Baxt. 604; 107 Iowa, 723, 70 Am. St. Rep. 228, 77 N. W. 467; 120 N. C. 270, 26 S. E. 810. A will may be proved by proof of the signatures of testator and subscribing witnesses, even though the latter fail to remember the act of execution. 50 S. C. 95, 27 S. E. 555; *Gillis v. Gillis*, 96 Ga. 1, 51 Am. St. Rep. 121, 30 L. R. A. 143. 23 S. E. 107. In these and similar points, the common rules of evidence will apply, subject to the local enactment and practice. See *supra*, 169-213. In general, the subscribing witnesses establish the signature to a will, and not its contents. *Baker's Appeal*, 107 Penn. St. 381, 52 Am. Rep. 478; *Bott v. Wood*, 56 Miss. 136; 140 Ill. 649, 33 Am. St. Rep. 265, 30 N. E. 683. See *Howes v. Colburn*, 165 Mass. 385, 43 N. E. 125.

<sup>2</sup> See Missouri statute cited in *Withington v. Withington*, 7 Mo. 589; Ill. Rev. Stats. 1880, c. 148; *supra*, 183. A full and complete attestation clause gives presumptive strength to whatever it may recite. *Bernsee's Will*, 141 N. Y. 189, 36 N. E. 314.

<sup>3</sup> 1 Jarm. Wills, 70, 90.

<sup>4</sup> *E. g.*, Mass. Pub. Stats. c. 127, §§ 1, 2. *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113.

<sup>5</sup> See Act 1 Vict. c. 26, § 9 (1837). But cf. § 14 of this enactment ("incompetency"). By "credible" witnesses, the English law has understood such persons as were not disqualified from testifying in courts of justice by mental imbecility, crime or interest 1 Jarm. 70, 90; 1 Burr. 414. In American practice, "credible" signifies the same as "competent"; that is to say, witnesses who are not disqualified to testify by the common-law rules of evidence at the time of attestation, as various codes are somewhat explicit in declaring. *Boyd v. McConnell*, 70 N. E. 649, 209 Ill. 396; 72 N. E. 1090, 213 Ill. 428; 58 N. E. 237, 187 Ill. 86 (though impeached as to veracity); 23 Pick. 10; 35 Mont. 185; 1 N. H. 273; 12 Sm. & M. 230; 18 Ga. 40; *Lord v. Lord*, 58

351. **As to wills the competency of witnesses, like that of the testator, is tested by one's status at the time when the will was executed.** If, therefore, a sufficient number of witnesses attest and subscribe properly who at that date are competent, the will remains valid, although death or a supervening statute disability may render any or all of them incompetent in fact by the time the will is offered for probate.<sup>1</sup> The converse of this proposition holds also true; namely, that the will is invalid unless witnesses of a sufficient number attest and subscribe properly, who at the date of execution are competent.<sup>2</sup>

352. **We may lay it down safely that idiots, lunatics and insane persons are incompetent to serve as subscribing witnesses to a will; nor can the broadest legislation of our day which sustains the validity of a will against the incompetency of witnesses be supposed to justify attestation of so impolitic a sort.**<sup>3</sup> Infants less than fourteen years may also be presumed incompetent witnesses, as they certainly are undesirable ones; but the real test being a defect of understanding in one so young, this presumption may be removed by proof to the contrary.<sup>4</sup> A minor above fourteen is *prima facie* competent.<sup>5</sup> One who does not understand the language in which the will is written is disqualified under the Roman, French and Spanish law, and in some American codes.<sup>6</sup>

353. **But the disqualification of interest is that which courts have chiefly to consider where the competency of a subscribing witness is drawn in question.** One who has an immediate beneficial interest in a will is at the common law disqualified from becoming a

N. H. 7; *Sullivan v. Sullivan*, 106 Mass. 474, 8 Am. Rep. 356; *Warren v. Baxter*, 48 Me. 193. See *Jones v. Larrabee*, 47 Me. 474 ("disinterested").

<sup>1</sup> 1 Burr. 414; 2 Str. 1253; 5 Mass. 219; *Sullivan v. Sullivan*, 106 Mass. 474, 8 Am. Rep. 356; *Patten v. Tallman*, 27 Me. 17; *Sullivan v. Sullivan*, 114 Mich. 189, 72 N. W. 135. Some American codes expressly embody this rule of law.

<sup>2</sup> 2 Str. 1253, 1255; *Warren v. Baxter*, 48 Me. 193; *Morton v. Ingram*, 11 Ired. 368; *Fisher v. Spence*, 150 Ill. 253, 41 Am. St. Rep. 360, 37 N. E. 314. For these attesting witnesses constitute the body-guard, so to speak, of the testator when he signs the will, and assure the present disposition as the free act of a capable mind. Hence, the execution would not be good if one of the attesting witnesses were at the time insane, or a little child incapable of understanding why he wrote or made his mark as others told him, even though it might happen by the time of probate that such witness had gained his full reason and understanding.

<sup>3</sup> See 1 Jarm. Wills, 111.

<sup>4</sup> *Carlton v. Carlton*, 40 N. H. 14.

<sup>5</sup> *Jones v. Tebbetts*, 57 Me. 572. The rule here applied to infants is the usual one concerning the testimony of such persons. Schoul. Dom. Rel. 3d Ed. § 398.

<sup>6</sup> *Dauterive's Succession*, 39 La. Ann. 1092, 3 So. 341. See *ib.* as to deaf persons, where a will is dictated. No barrier of sex is usually raised apart from considerations of marital interest. But see peculiar code prohibition cited in 31 La. Ann. 315.

subscribing witness thereto: he is neither "competent" nor "credible," in the sense of our statutes; and the test of competency is the state of facts when the will was made and not when it comes into operation.<sup>1</sup> This policy extends to those beneficially interested who are not subscribing witnesses; and such persons cannot testify to the execution of a will.<sup>2</sup>

354. **As to judges, executors, incorporators, etc.** A judge of probate or other judicial officer is a competent subscribing witness to a will; at all events, where the issues of probate may be tried before some one else.<sup>3</sup> Nor is an executor, according to current opinion, incompetent, even though by the American rule his right to commissions and compensation gives him a sort of pecuniary interest under the will;<sup>4</sup> while the English Statute of Victoria expressly declares (in a country where such trusts have always been esteemed voluntary and gratuitous) that an executor shall be an admissible witness.<sup>5</sup> A corporator and member of a charitable

<sup>1</sup> 1 Burr. 97; 23 Pick. 10; *Sparhawk v. Sparhawk*, 10 Allen, 155; 46 N. H. 125; *Lord v. Lord*, 58 N. H. 7, 42 Am. Rep. 565; *Slingluff v. Bruner*, 174 Ill. 561, 66 Am. St. Rep. 318, 51 N. E. 772; *Trinitarian Church, Re*, 91 Me. 416, 40 A. 325 (a contingent legatee).

<sup>2</sup> *Miltenberger v. Miltenberger*, 78 Mo. 27. See *Mercer v. Mackin*, 14 Bush, 434. As to holograph will, see *Hampton v. Hardin*, 88 N. C. 592. The interest, to be disqualifying, must be, however, a present, certain and vested interest. *Jones v. Tebbetts*, 57 Me. 572; 9 Pick. 350, 20 Am. Dec. 481; *Lord v. Lord*, 58 N. H. 7, 42 Am. Rep. 565. And as to a married woman's will, see *Camp. v. Stark*, 81\* Penn. St. 235, 22 Am. Rep. 743. But cf. 91 Me. 416, 40 A. 325. That one's mother or father is named as principal devisee does not render a witness incompetent to subscribe, even though the latter receive a gift besides at the date of execution. *Nash v. Reed*, 46 Me. 168; 2 Overt. 172. And see *Old v. Old*, 4 Dev. 500. An heir at law, who is disinherited, is likewise a competent witness in support of the will which disinherits him; so, too, when he takes a legacy under the will of less value than his interest would have been without the will. *Smalley v. Smalley*, 70 Me. 545, 35 Am. Rep. 353; *Sparhawk v. Sparhawk*, 10 Allen, 155; 358. And, generally speaking, a witness may be produced to testify against his interest without legal disqualification. *Clark v. Vorce*, 19 Wend. 232. If it stand indifferent to the witnesses whether the will under which they are legatees and which they have subscribed be valid or not, they are pronounced credible. *Bac. Abr. Wills, D.* Or "disinterested." 70 Me. 548, 35 Am. Rep. 353. The dominant purpose of such legislation is simply that the witnesses to whom the testator intrusts the establishment of his intent in probate shall be free from any bias or temptation to establish, such as a pecuniary interest would engender. See 91 Me. 421, 40 A. 325.

<sup>3</sup> *McLean v. Barnard*, 1 Root, 462; 2 Root, 232. Statutes are sometimes specific on this point. And see as to the alcade under Mexican law, *Panaud v. Jones*, 1 Cal. 488. See also 79 Me. 25, 8 A. 87; *supra*, 23.

<sup>4</sup> *Wyman v. Symmes*, 10 Allen, 153; 103 Minn. 286, 114 N. W. 838; 3 Redf. 74; *Stewart v. Harriman*, 56 N. H. 25, 22 Am. Rep. 408; 7 Fla. 292, 68 Am. Dec. 441; *Richardson v. Richardson*, 35 Vt. 238; *Jones v. Larrabee*, 47 Me. 479; 161 Penn. St. 393, 29 A. 3; 67 N. H. 254, 68 Am. St. Rep. 661, 32 A. 158.

<sup>5</sup> Stat. 1 Vict. c. 26, § 17. An executor who is entitled to a legacy in that character may be a competent witness if he releases his legacy. 2 Curt. 72; 1 Wms. Exrs. 345. And see 12 East, 250. Nevertheless, an executor who intends to accept the trust with recompense seems an undesirable person for subscribing witness, and one whose

corporation is a competent witness to a will which gives property so the corporation.<sup>1</sup> And so may be an inhabitant of some town or municipal corporation to which property is devised or bequeathed for educational or charitable purposes.<sup>2</sup> A bequest to a person strictly in trust for another is not to be pronounced a direct beneficial interest such as to disqualify him.<sup>3</sup>

355. **As to those in the marital relation**, the wife, according to the better opinion, should not be witness to her husband's will, nor the husband to his wife's will; a rule which conforms to the old law of coverture.<sup>4</sup> And where a devise or bequest is given to either the husband or wife of an attesting witness, such witness is usually to be deemed a disqualified party.<sup>5</sup> In view, however, of our later marital policy, more favorable to the independence of spouses than formerly, it is well for the local statute of wills to be more precise on this point, and the Statute of Victoria furnishes an example accordingly.<sup>6</sup>

356. **Whether a creditor must be treated as an incompetent subscribing witness** to a will by reason of his direct interest under certain circumstances, is not clearly determined; but the usual policy of English and American legislation prevents their disqualification even where the will makes an express charge of real or

bias in a close contest might break down the will; and some States appear to regard an executor as competent only when, having declined or renounced the trust, he is clearly disinterested. *Snyder v. Bull*, 17 Penn. St. 54; *Tucker v. Tucker*, 5 Ired. 161; *Exrs. post*, 76; *Jones v. Larrabee*, 47 Me. 474; *Burritt v. Silliman*, 13 N. Y. 93, 64 Am. Dec. 532. See *Tait Evid.* 84, as to the Scotch law. An executor may release his pecuniary interest under the will and stand the better qualified as a witness. 3 Redf. 74.

<sup>1</sup> *Quinn v. Shields*, 62 Iowa, 129, 17 N. W. 437, 49 Am. Rep. 141.

<sup>2</sup> 1 Day, 35; *Warren v. Baxter*, 48 Me. 193; *Loring v. Park*, 7 Gray, 42; 1 N. H. 273; *Jones v. Habersham*, 63 Ga. 146; 79 Me. 25, 8 A. 87.

But if the will were in favor of some private business corporation, *semble* that a stockholder therein would be disqualified by reason of interest. Though not where the aim of the bequest is charitable. *Marston, Ex parte*, 79 Me. 25, 8 A. 87; *Hitchcock v. Shaw*, 160 Mass. 140, 65 N. E. 671; 72 Me. 156; *Boyd v. McConnell*, 70 N. E. 649, 209 Ill. 396 (trustee of a college).

<sup>3</sup> *Creswell v. Creswell*, L. R. 6 Eq. 69; *Loring v. Park*, 7 Gray, 42. But as to making the trustee under the will a competent witness, note what is said as to executors, *supra*.

<sup>4</sup> *Pease v. Allis*, 110 Mass. 457, 14 Am. Rep. 591; *Dickinson v. Dickinson*, 61 Penn. St. 401; *Smith v. Jones*, 68 Vt. 132, 34 A. 424 (where there had been an antenuptial exclusion); 150 Ill. 253, 41 Am. St. Rep. 360, 37 N. E. 314; *Holt's Will*, 56 Minn. 33, 45 Am. St. Rep. 434, 57 N. W. 219; 60 N. E. 706, 157 Ind. 49.

<sup>5</sup> *Sullivan v. Sullivan*, 106 Mass. 474, 8 Am. Rep. 356; *Winslow v. Kimball*, 25 Me. 493; 67 N. H. 254, 68 Am. St. Rep. 661; 1 Johns. Cas. 163. *Contra*, *Hawkins v. Hawkins*, 54 Iowa, 443; 70 Iowa, 343, 30 N. W. 608. See *Giddings v. Turgeon*, 58 Vt. 106; *Sloan's Estate*, 56 N. E. 952, 184 Ill. 579.

<sup>6</sup> See Act 1 Vict. c. 26, § 15, which annuls all gifts to the husband or wife of an attesting witness. And see 58 Vt. 106.

personal property to secure the debt.<sup>1</sup> Persons to be remotely benefited under a will are not readily to be pronounced incompetent witnesses, so as to imperil a will;<sup>2</sup> and where there is a sufficiency of witnesses, after leaving out one incompetent or of doubtful competency, the will, of course, is to be upheld.<sup>3</sup>

357. **The hardship of breaking down a will, through some inadvertent selection of a witness** who himself might have been quite unconscious of his interest, led common-law courts to avoid the worst mischief by permitting such a witness to release his interest at the probate, and so render himself competent.<sup>4</sup> But this permission, which was not clearly conceded by all tribunals, must have been liable to great abuse; it was accorded against legal consistency; and the very option to release invested such a witness with such undue power for destroying or saving the will at his own choice, that sinister, secret, and corrupt bargains for purchasing his good will must have followed. The English Parliament soon adopted another expedient for avoiding the sacrifice of an entire will on the one hand, and the arbitrary choice of an interested witness on the other; namely, to annul all beneficial devises and legacies to attesting witnesses, and render such persons competent to all other intents in spite of a testator's heedlessness or their own.<sup>5</sup> In most parts of the United States similar legislation may be found, and witnesses to a will are rendered incapable of taking any beneficial interest under the will, unless there be the statutory number of competent witnesses without them, while they stand competent to prove the will in all other respects.<sup>6</sup>

<sup>1</sup> See English statute 25 Geo. II, c. 6, § 2 (creditors whose debts are charged by a will or codicil), confirmed and extended by Act 1 Vict. c. 26, § 16. Similar legislation may be found in various American States. 1 Jarm. Wills, 71, 73, and Bigelow's note; Stimson's Am. Stat. Law, § 2648.

<sup>2</sup> E.g., members of a religious order, who surrender to it all their property, as to will of a fellow member. *Will v. Sisters*, 67 Minn. 335. So the prospective heirs-at-law of a legatee are competent, for they take nothing under the will. *Jones v. Tebbetts*, 57 Me. 572.

<sup>3</sup> See *Faux, Re*, W. N. 249 (1888).

<sup>4</sup> 1 Jarm. Wills, 70.

<sup>5</sup> See 1 Jarm. Wills, 71, 72; Stats. 25 Geo. II, c. 6; Act 1 Vict. c. 26. The annulment applies of course only to the instrument actually attested, and not so as to invalidate one's interest under another will or codicil. *Tempest v. Tempest*, 2 Kay & J. 635; (1899) 2 Ch. 764. Under this English statute, a trustee who is a solicitor, loses a right given him under the will to charge for professional services, if he attests. *Burgess v. Vinicombe*, 31 Ch. D. 665; 34 Ch. D. 77; 40 Ch. D. 1.

<sup>6</sup> See 1 Jarm. Wills, 71, Bigelow's note; *supra*, 23; Stimson's Am. Stat. Law, § 2650. Where two witnesses would suffice, and three persons actually subscribe, one of whom proves a devisee named in the will, it is fair to treat such a devisee's signature as superfluous. See 103 N. C. 40, 14 Am. St. Rep. 783, 9 S. E. 644; 43 W. Va. 300, 27 S. E. 323; *Harp v. Parr*, 168 Ill. 460, 48 N. E. 113; 56 N. Y. S. 853.

358. In nearly all of our United States a devise or bequest to a person who would inherit under the laws of distribution does not invalidate the will or render such person incompetent as a subscribing witness; but the devise or bequest is good only so far as it does not exceed what he would have taken by inheritance in the event of intestacy.<sup>1</sup>

Harsh as such a policy may be thought, it appears to work well; more care is taken than formerly in the attestation of wills, and the rules of evidence are greatly simplified. But in a few American States a legatee is rendered competent, by express legislation, if he release or refuse to accept his legacy, as under the older English rule. See 1 Jarm. Wills, 71, Bigelow's note; Stimson's Am. Stat. Law, § 2650; *Nixon v. Armstrong*, 38 Tex. 296; *Grimm v. Tittmann*, 113 Mo. 56, 20 S. W. 664. See also *Estep v. Morris*, 38 Md. 417; *Kumpe v. Coons*, 63 Ala. 448; *McKeen v. Frost*, 46 Me. 248; *Miltenberger v. Miltenberger*, 78 Mo. 27.

<sup>1</sup> This seems to be the purport of such codes, though the language somewhat varies. Stimson's Am. Stat. Law, § 2651. And see *supra*, 23; *Maxwell v. Hill*, 89 Tenn. 584, 15 S. W. 253; *Smalley v. Smalley*, 70 Me. 545, 35 Am. Rep. 353; 10 Allen, 155

## CHAPTER IV.

## NUNCUPATIVE OR ORAL WILLS.

359. Wills are generally to be executed with all the formalities of written expression, signature, and attestation, which our preceding chapters have set forth in detail; and the term "wills" in this connection includes codicils and every sort of testamentary disposition. Such is our modern policy, English and American. But, as we have shown, there are various American codes which dispense to some extent with the formal attestation of witnesses, such as holograph wills, or those written out by the testator's own hand.<sup>1</sup> There remains, however, for consideration a class of wills still more informal in character, and in fact founded upon a testamentary disposition purely oral, though afterwards committed to writing. These oral or unwritten wills, properly styled, where non-execution is in the broadest sense an incident, let us now proceed to consider.

360. The oral will is usually designated at our law by the term "nuncupative," which we borrow, like the testament itself of this character, from the Roman civilians. A nuncupative will is an oral will declared by a testator before witnesses, and afterwards reduced to writing. The law supposes such a will to be made *in extremis* or under circumstances fairly equivalent, such as prevented or hindered him from executing a more formal one.<sup>2</sup>

361. In the ancient days of our common law, and before the general cultivation of letters, the doctrine of nuncupative wills appears to have maintained a firm footing. Derived from the Roman jurisprudence originally, it was incorporated into our system, and acted upon *proprio vigore*, long before the Statute of Frauds and the Statute of Wills.<sup>3</sup>

<sup>1</sup> *Supra*, 254, 255.

<sup>2</sup> We shall see presently that the instances are very rare where testaments of this description are by our modern English-inspired codes allowed any legal validity, those exceptions being specified by the local statute itself. 2 Bl. Com. 500; Bouvier Dict. "Nuncupative Will"; *supra*, 6.

<sup>3</sup> According to the Institutes of Justinian, if one wished to dispose of his effects by what our common law denominates a nuncupative or unwritten testament, he might do so by a verbal declaration in the presence of seven witnesses. No immediate reduction to writing of such a testament appears to have been necessary; but the disposition might rest in parol proof until after the testator's death; though such was not always the case. It was sufficient if the witnesses, within a reasonable time after

362. **Such nuncupative wills were as efficacious as any testament in writing**, so far as related to the testator's personal estate alone. But lands and tenements being the subject of devise only by force of the statutes of Henry VIII (32 and 34 Hen. VIII), a nuncupative devise must have been of too informal a character to operate.<sup>1</sup>

363. **The frauds and perjuries to which nuncupative wills were liable** made one of the objects which the famous Statute of Frauds sought to correct.<sup>2</sup> Accordingly, such testaments were at once laid under strong restrictions which English policy has never since taken off. And the only real and lasting exception to these restrictions was declared in favor of "any soldier being in actual military service, or any mariner being at sea"; the British army and navy being thus secured in the full benefit of that testamentary privilege which the Roman soldier had enjoyed.<sup>3</sup>

the death of the testator, went before a magistrate, and gave an account of what took place; a formal statement being then drawn up and signed, the proof of the will was perpetuated. Just. Inst. lib. 2, tit. 10, § 14. See *Prince v. Hazleton*, 20 Johns. 519.

Such, in general substance, was the nuncupative will of the common law, as Swinburne described it, with the requirement omitted of so many witnesses; and yet admitting of a purely verbal disposition until, from the lips of a witness or witnesses sufficient for proving it, the will was put into writing and properly shaped for permanent preservation and record. The testator uttered his wishes; it did not follow, however, that he inspected what was afterwards written out, but usually the reverse, as his death speedily followed. Swinb. pt. 4, § 29, p. 350; *ib.*, pt. 1, § 12, p. 58. And see Perkins, § 476 (published under Henry VIII). Swinburne's treatise was published in the time of James I. Whether in the days of our common law, nuncupative wills were necessarily to be pronounced invalid, unless made *in extremis*, or when one was sick and in fear of death, is uncertain; probably before the fifteenth century they were not, nor perhaps were they even as late as the enlightened times of Henry VIII, Elizabeth, and the first James. But by the latter date nuncupative wills were certainly confined in practice to extreme cases, as both Perkins and Swinburne intimate. *Id.* And see 20 Johns. 511, 519; 42 N. J. Eq. 625. Under the Roman law, with its strong array of surrounding witnesses, sickness and last extremity made no indispensable condition of such testaments; probably, because the safeguards against fraud were thought sufficient without it.

<sup>1</sup> *Supra*, 15, 253.

<sup>2</sup> Concerning the origin of that statute, and the hand taken by Lord Hale and others in shaping so renowned a piece of legislation, see 18 Am. Law Rev. 442 (1884) by this author. And see *Coles v. Mordaunt*, 4 Ves. 196, for a remarkable case of perjury under the nuncupative revocation of a will, which must have influenced Parliament in the present enactment.

<sup>3</sup> Act 29 Car. II, §§ 19-23.

"For prevention of fraudulent practices in setting up nuncupative wills, which have been the occasion of much perjury," the Statute of Frauds prescribed as follows, with the reservation above noticed, in favor of soldiers and mariners: No nuncupative will shall be good where the estate bequeathed exceeds the value of thirty pounds, (1) unless it is proved by the oath of three witnesses at least who were present at the making thereof; (2) nor unless it is proved that the testator at the time bade the persons present, or some of them, to bear witness that such was his will, or to that effect; (3) nor unless such will was made in the time of the testator's last sickness, and in his dwelling house, or where he had resided for at least ten days next before making the will, except where he was surprised or taken sick while away from his own home and died before he returned; (4) nor generally unless the substance of the testimony to



364. Even under these restraints, the nuncupative will has become obnoxious to modern policy, and since 1837 has been virtually abolished in England, except as to soldiers and mariners.<sup>1</sup>

365. In examining the American codes on this subject we find, naturally enough, enactments in many of the older States which are based upon the Statute of Frauds, and incorporate in substance most of the English restrictions of the period 1677-1837. But, to take the latest codes and the enactments now in force on this subject, the general invalidity of nuncupative wills, except as to the personal property of soldiers and mariners, and of all testaments which are not properly written out, signed, and attested as the local act directs, or, in other words, the policy of the period since 1837, is found a prominent trait.<sup>2</sup> But while American policy at the present day discourages oral testaments, there are great variations of principle under which they are permitted in the several States.<sup>3</sup>

prove such a will was committed to writing within six days after the will was made. The same statute introduced new safeguards against the hasty probate of nuncupative wills; and proceeded to declare that no written will should be repealed or altered by oral words not reduced into a written shape during the testator's life and allowed by him before three witnesses at least. Stat. 29 Car. II, §§ 19-23.

<sup>1</sup> Act 1 Vict. c. 26, (1837) § 11. That exception applies, like the old nuncupative disposition itself in all other instances, to wills of personal property only.

<sup>2</sup> See e.g. 20 Johns. 503; *Hubbard v. Hubbard*, 8 N. Y. 196; *Turner, Ex parte*, 24 S. C. 211; *Stimson's Am. Stat. Law*, 2700.

<sup>3</sup> Many local codes, embracing every quarter of the Union, test the validity of the nuncupative will largely by the amount to be disposed of, the limit ranging usually from \$30 to \$500, while in California and Nevada \$1,000 may be thus bequeathed. See local enactments collected in 1 Jarm. Wills, 97, Bigelow's note. This limitation of value, so as to sanction nuncupative dispositions of petty estates, is one of the remnants of the old Statute of Frauds. See *supra*, 363. California, again, adds to the privileged class of soldiers and sailors persons who are expecting immediate death from injuries received the same day; and the idea of permitting a nuncupative will in cases of one's sudden illness and death while away from home, is expressed with more or less favor in various local codes. *Stimson*, §§ 2701, 2702. Nor should we overlook the moulding influences of Continental Europe in such States as Louisiana, under whose code the nuncupative testament signifies broadly an open testament, while the old nuncupative will, as our common law understands it, has been essentially abolished. The civil code of this State divides all testaments into these three classes: (1) Nuncupative or open testaments; (2) mystic or sealed testaments; (3) holographic (or olographic) testaments. See *supra*, 6. Upon this fundamental division is based the jurisprudence of this State relative to nuncupative wills, and citations from Louisiana reports must be understood accordingly. The method of making nuncupative testaments, either by public act, or by act under private signature, is fully set forth in the revised civil code of that State. See *Rev. Civ. Code La.* § 1567 *et seq.* See also 35 La. Ann. 865; *Adams v. Norris*, 23 *How.* 353, 16 L. Ed. 539; 37 La. Ann. 833 (written out by notary). And see 39 La. Ann. 294, 1092, 1 So. 681, 3 So. 341; 41 La. Ann. 1109, 1153, 7 So. 126, 5 So. 528; 42 La. Ann. 1086, 9 L. R. A. 829, 8 So. 268; 43 La. Ann. 1088, 20 So. 281; 49 La. Ann. 868, 62 Am. St. Rep. 672, 21 So. 586; 50 La. Ann. 66, 23 So. 106, 45 So. 565; 38 So. 930 (La. 1905). See also 28 So. 722, 77 Miss. 892, 78 Am. St. Rep. 551 (notary's act and record).

366. **Who constitute this privileged class, which have constantly been permitted to dispose of their personal property, their wages, goods and chattels, by word of mouth, to the exclusion at length of all others?** The words of the local statute sufficiently explain for the most part: in general, they are soliders in actual service and mariners at sea, or by whatever similar expression the legislature may have described them.<sup>1</sup>

367. **But the restrictions under which soldiers and mariners are expressly laid by the language of the act in question curtail the privilege considerably.** Nor is this curtailment the same in either instance. (1) The soldier has no special privilege of nuncupation by our law unless "in actual military service," that is to say, "while engaged in an expedition," for these terms are taken by the courts as synonymous.<sup>2</sup> (2) The mariner's privilege of nuncupation lies

In general, nuncupative wills, under our American codes, cannot dispose of lands, but of personal property only; following in this respect the rule of England and the common law. See 362. It has been repeatedly declared, in construction of the local enactment, that no power is thereby conferred to dispose of real estate by a nuncupative will, no such right having existed at the common law. 2 Rob. (Va.) 424; *Smith-deal v. Smith*, 64 N. C. 52; 2 Dana, 390; *Campbell v. Campbell*, 21 Mich. 438; *McLeod v. Dell*, 9 Fla. 451; *Sadler v. Sadler*, 60 Miss. 251. But the Ohio statute has been construed as conferring such a right. *Ashworth v. Carleton*, 12 Ohio St. 381; 10 Ohio, 462. So has that of Texas. *Moffett v. Moffett*, 67 Tex. 642, 4 S. W. 70, and cases cited. Cf. 70 Tex. 18, 6 S. W. 818.

<sup>1</sup> English and American courts agree in giving to this language of the codes a liberal interpretation. The term "soldier" as thus applied is not confined to those who serve in the ranks, but embraces every military grade from private to commander-in-chief; it includes generals, regimental and line officers, those assigned to field or staff duty, surgeons, all who hold commissions or warrants, or are borne on the rolls as enlisted men, provided the condition of "actual military service" be fulfilled. 3 Curt. 537; *Van Deuzer v. Gordon*, 39 Vt. 111; *Leathers v. Greenacre*, 53 Me. 561; *Spratt's Goods*, (1897) P. 28. Regulars and volunteers, when enrolled and serving at the call of government in some crisis, belong equally to this privileged class; though members of the volunteer militia and home reserves certainly do not, while pursuing their peaceful occupations as citizens, or parading for drill or pleasure. See *Van Deuzer v. Gordon*, 39 Vt. 111; *Leathers v. Greenacre*, 53 Me. 561. And see *Donaldson's Goods*, 2 Curt. 386. As to "mariners," a like liberal construction prevails, and the whole marine service is included, superior officers up to the highest in command as well as common seamen. The purser of a man-of-war is a mariner, in this sense, and so are all others who belong to the navy. *Hays's Goods*, 2 Curt. 338. And to those, moreover, in the merchant service does the same privilege extend: to the captain, for instance, of a coasting vessel, or the cook on board a steamer. 2 Rob. 108; 1 Hagg. 51; *Parker, Re*, 2 Sw. & Tr. 375; *Hubbard v. Hubbard*, 8 N. Y. 196; 4 Bradf. 154. A mere passenger on a vessel is of course no "mariner." *Warren v. Harding*, 2 R. I. 133.

<sup>2</sup> As one of a privileged class he may make a valid oral will, though well and strong, and not *in extremis*, but only exposed to that general peril which attends all military expeditions. The term "expedition" is not confined to the period of conflict nor to that movement of troops which immediately precedes or brings on the shock of an engagement; but while encamped in an enemy's country, surrounded by a hostile population, taking part in operations directed against the foe, and, as one would say, at the seat of war, a soldier is properly deemed in actual military service and capable of making a nuncupative will, although his own present and immediate share in those

under a different condition: that, namely, of "being at sea"; and the general peril here kept in view, is of a different description, though quite as real as the other, while for similar reasons it may be inconvenient for one to prepare a testament formal in all points as the statute imposes upon those who are safe at home.<sup>1</sup>

368. A few other cases of privileged persons are mentioned in some of the codes with reference to extreme emergencies or trivial estates, but the courts have had little occasion to consider their status.<sup>2</sup>

operations may be at some quiet and remote post, or during a lull in hostilities. For all campaigns involve periods of action and inaction, and in all such service detachments must relieve one another, and points distant or near to the enemy must be well covered; and marching orders may arrive at any moment. See *Leathers v. Greenacre*, 53 Me. 561, one of the latest cases where this subject is well discussed; 39 Vt. 119; *Herbert v. Herbert*, Dea. & Sw. 10; 39 Jur. 569. Courts may well go a step farther, and dropping this word "expedition," construe "actual military service" to mean the active exercise of military functions at times of danger, whether in the enemy's country for aggressive war, or for defence at home, when invasion, insurrection, or riot is to be put down. See *Van Deuzer v. Gordon*, 39 Vt. 111, 118; 1 Abb. Pr. N. S. 112. But on the other hand, while one is quietly quartered in barracks, at home or abroad, performing a sort of routine guard duty, and engaged in no active operations, offensive or defensive, which threaten death and move him towards a scene of danger, he cannot make a valid nuncupative will, as the courts have decided *Drummond v. Parish*, 3 Curt. 522; 3 Curt. 818. See 2 Curt. 341, 368; 1 Robert. 276. Nor can he while at home on furlough, or near home in the camp where troops are recruited and organized before they are sent to the seat of war; for at such times he stands in no need of a privilege, but may pursue the prudent formalities imposed upon civilians. 6 Phil. (Pa.) 104; *Van Deuzer v. Gordon*, 39 Vt. 111. The Roman military testament, whose first sanction came from Julius Cæsar, was limited in like manner to soldiers when in actual service and while they lived in tents. Veterans after dismissal, soldiers out of camp, soldiers not upon an expedition, but living in their own houses or elsewhere, were required to make their testaments like other citizens. Just. lib. II, tit. 11; 53 Me. 570.

<sup>1</sup> In legal parlance waters within the ebb and flow of the tide are considered the sea; and hence the mariner may exercise his right of nuncupation while the vessel is on a voyage, and lying at anchor in an arm of the sea, or while in the tide-waters of a harbor. *Hubbard v. Hubbard*, 8 N. Y. 196; 4 Bradf. 154. Cf. *Warren v. Harding*, 2 R. I. 133. This seems to be the natural limit of the rule; and admiralty law may guide to the conclusion in a case of doubt. But the spirit of this privileged legislation is sometimes invoked as against a literal construction of the phrase "at sea", where one living "at sea" goes casually on shore. Cf. *Easton v. Seymour*, 3 Curt. 530; *Lay's Goods*, 2 Curt. 375. And again the fact that a nuncupative will is made by one while on a naval expedition and exposed to the peril of death, has given it peculiar favor, like that accorded to military testaments, and brought it within the spirit of the exception. *Austen's Goods*, 2 Rob. 611. *Contra*, *Gwin's Will*, 1 Tuck. 44. As a general rule the will of a mariner not in actual service during war is not made "at sea" if made on a river. See 2 R. I. 133; 3 Curt. 522; 79 Law T. N. S. 123.

As to adopting later, and when within the condition above defined, an invalid will, see *Van Deuzer v. Gordon*, 39 Vt. 111.

<sup>2</sup> See 365, *supra*; *Carroll v. Bonham*, 42 N. J. Eq. 625, 9 A. 371. And see Stat. 29 Car. II, § 19, which sets forth its restrictions merely with reference to wills bequeathing more than £30; leaving only the general restraints of the older common law to operate as to wills of less value. *Supra*, 363. Some American codes contain the same idea under varying forms of expression. *Supra*, 365.

369. Now, to consider the essential points which arise in connection with nuncupative wills. We shall discuss them in the following order: (1) Whether the will must be made *in extremis*; (2) the place of making the will; (3) the manner of declaring one's disposition; (4) the requisite number of witnesses to the will; (5) the subsequent reduction of the will to writing; (6) strictness of proof as to all material facts; (7) whether informal writings may be upheld as nuncupative wills; (8) repeal or alteration of a written will by a nuncupative one.

370. (1) **Whether the will must be made *in extremis*.** That this is not essential in the case of the privileged soldier, we have already observed,<sup>1</sup> and the same holds probably true of the privileged mariner; for the one being in "actual military service" and the other "at sea," a general exposure to sudden death supplies sufficient peril upon which legislation founded its exception.<sup>2</sup> But, aside from such exceptions, the modern rule as fairly settled is that a nuncupative will is not good unless it be made when the testator is *in extremis*.<sup>3</sup>

371. **But there appears a discrepancy in the decided cases concerning the pressure of that extremity which shall justify an unprivileged nuncupation.**<sup>4</sup>

<sup>1</sup> *Supra*, 367.

<sup>2</sup> As to the privileged disposer of a petty estate, a nice question may arise; namely, whether by the law of England, prior to and independently of the Statute of Frauds, all nuncupative wills must be made *in extremis* in order to be valid. Cf. *Prince v. Hazleton*, 20 Johns. 503, 11 Am. Dec. 307, where the history of nuncupative wills is traced down from the earliest times. See 368.

<sup>3</sup> Cases next section. See 361. "Last sickness" is the expression used in the Statute of Frauds; and the same words are transplanted in American codes; and by these words should be understood one's last extremity. But cf. 2 Ala. 239.

<sup>4</sup> The long train of restrictions imposed by the act of 29 Car. II, evidently discouraged testators from that form of bequest; for Blackstone found it hardly ever heard of by his day, "but in the only instance where favor ought to be shown to it, when the testator is surprised by sudden or violent sickness." 2 Bl. Com. 501. Nor do the English reports furnish a single valuable comment upon a point which, as legislation now stands in that country, can never arise again. But see facts in *Freeman v. Freeman*, 1 Cas. temp. Lee, 343 (1753). See circumstances in *Jackson v. Bennett*, 2 Phillim. 90, which case, however, decides nothing in point. In this country, however, the question of extremity has been discussed in several cases. In general if the testator recover, even when he has made a nuncupative will with due formality, it becomes of no force; and even though a lingering sickness proved his last, yet if his mental and physical condition afforded an ample opportunity and inducement to prepare and execute a written will, after his nuncupation occurred, the spoken words could not operate as those of a "last sickness." *Prince v. Hazleton*, 20 Johns. 502; 4 Rawle, 46, 26 Am. Dec. 115; *Haus v. Palmer*, 21 Penn. St. 296; *O'Neil v. O'Neill*, 33 Md. 569; *Carroll v. Bonham*, 42 N. J. Eq. 625, 9 A. 371; *Scaife v. Emmons*, 84 Ga. 619, 10 S. E. 1097, 20 Am. St. Rep. 383; *Rutt's Estate*, 50 A. 171, 200 Penn. 549. This justifies the policy of the Statute of Frauds, which, by the better opinion, meant to deal strictly with all non-privileged cases, and only tolerated these nuncupative wills under the

372. (2) **As to the place of making the nuncupative will.** The common law makes no restriction in this respect for one kind of testament more than another. But under the Statute of Frauds nuncupative wills of the non-privileged sort can only be made in one's dwelling, unless the testator is surprised or taken sick while absent and dies before his return.<sup>1</sup> Our local code at the present day must determine whether any such restraints still operate.<sup>2</sup>

373. (3) **As to the manner of declaring one's disposition,** or what we may term the nuncupation. The Statute of Frauds expressly enacts that the testator shall, at the time of pronouncing his will, bid the persons present or some of them bear witness that such was his will, or to that effect.<sup>3</sup>

stress of a supposed necessity. Though the lingering disease should prove finally fatal, it must come to the last stage of extremity, if not to the last day or hour, in order to be a "last sickness" within the statute; and even here nuncupation may be prejudiced by the neglect to prepare in good season a written will in view of certain death. But a more liberal rule is announced in Alabama: namely, that if the words are spoken in the sickness of which one dies, and under a sense of approaching death, it may suffice, even though the party lived long enough after the nuncupation to afford a fair opportunity for reducing his desires to the more permanent form of a written and executed will. *Johnson v. Glasscock*, 2 Ala. 239. And see 47 Wash. 253, 91 P. 967; *Godfrey v. Smith*, 73 Neb. 756, 103 N. W. 450; *Baird v. Baird*, 79 P. 163, 70 Kan. 564. *Sadler v. Sadler*, 60 Miss. 251, intimates that the concrete facts of each case should be weighed, but announces no positive opinion. Neglect to make a written will, upon the physician's warning, until it became too late, does not exclude the right to make one by nuncupation. 187 Penn. St. 82, 67 Am. St. Rep. 569, 40 A. 980; 96 Ga. 467, 23 S. E. 387.

<sup>1</sup> Act 29 Car. II, § 19; *supra*, 363.

<sup>2</sup> See *Marks v. Bryant*, 4 Hen. & M. 91; *Nowlin v. Scott*, 10 Gratt. 64, Virginia statute ("habitation" used in the sense of "dwelling-house," etc.). The privileged soldier, mariner, etc., has no such restraint. See 367, 368.

<sup>3</sup> Act 29 Car. II, § 19; 363. This is technically called the *rogatio testium*; and the statute requirement, whose policy plainly is to establish testamentary intent so clearly that bystanders may not frame a will out of words loosely spoken by the dying person, has been strictly construed in England and America. *Bennett v. Jackson*, 2 Phillim. 190; *Cas. temp. Lee*, 588; *Hebden's Will*, 20 N. J. Eq. 473; *Dockrum v. Robinson*, 26 N. H. 372; *Broach v. Sing*, 57 Miss. 115. And see *Bundrick v. Haygood*, 106 N. C. 468; 11 S. E. 423; *Godfrey v. Smith*, 73 Neb. 756, 103 N. W. 450; *Baird v. Baird*, 79 P. 163, 70 Kan. 564; *Scales v. Thornton*, 44 S. E. 857, 118 Ga. 93; 41 S. E. 621, 115 Ga. 286. A dying person may give many farewell messages, may express many farewell wishes, often changing his mind, adding or substituting as new ideas occur; but to constitute the oral will, he must have concluded its substance in his own mind, and, gathering up his faculties, he must set forth clearly before the witnesses what shall be this disposition once and for all, and so give point to the transaction as an ideal execution of his will on the spot, including a request for their ideal attestation thereof.

Independently of such legislation, and prior to the statute of Charles II, very nearly the same *rogatio testium* appears to have been indispensable at our law; for though no precise form of words was prescribed, the alleged nuncupation must have disclosed a present consistent intention solemnly declared before witnesses. This nuncupation on his part manifested a testamentary intent, whether one used the word "will" or "testament," or not. See *Swinb. pt. 4, § 29*; *pt. 1, § 12*; *Perk. § 476*. In this aspect, then, our privileged classes of testators appear to have no substantial advantage over others; except it be in dispensing with the more formal declaration of the statute

374. Hence a strict *rogatio testium* applies to wills which derive no privilege beyond that accorded to a nuncupation for establishing them.<sup>1</sup>

375. (4) As to the number of witnesses who are required to prove the will. The Statute of Frauds declared that no nuncupative will should be good that was not "proved by the oath of three witnesses"; and so strictly has this provision been construed, that where one of the three witnesses present at a certain nuncupation died before he could make proof, the will was held to be invalid.<sup>2</sup> So must these three witnesses be in substantial accord as to what the will of the deceased really was.<sup>3</sup> A statement before less than the requisite number of witnesses does not constitute a valid nuncupation.<sup>4</sup>

where other circumstances sufficiently establish that nuncupation and a last will were in fact intended. It appears that at common law a nuncupative will may be made at the interrogation of another. Swinb. pt. 1, § 12, pl. 6; 1 Wms. Exrs. 122. See *Gould v. Safford*, 39 Vt. 498. Or perhaps where the will is founded upon letters, an unperfected instrument in writing, or other proof not purely oral. See *post*, 378. But military testaments were always treated with singular indulgence; and the same indulgence may possibly extend to mariners at sea. The civil law was very indulgent in respect to wills of soldiers, and if a soldier wrote anything in bloody letters on his shield, or in the dust of the field with his sword, it was held a good military testament. 1 Bl. Com. 417. And see Swinb., *supra*.

<sup>1</sup> Verbal instructions and directions for drawing up a written will do not constitute a present nuncupative will, although spoken in presence of the proper number of witnesses. 75 Miss. 294, 22 So. 803; *Knox v. Richards*, 35 S. E. 295, 110 Ga. 5; 50 A. 171, 200 Penn. 549; *Dockum v. Robinson*, 26 N. H. 372. And see 3 Leigh, 140, 23 Am. Dec. 258; *Reese v. Hawthorn*, 10 Gratt. 548; *Hebden's Will*, 20 N. J. Eq. 473. Nor is it enough that one declares his will to witnesses separately and apart from one another. 1 Add. 389; *Brown v. Brown*, 2 Murph. 350; *Ridley v. Coleman*, 1 Sneed, 616; *Arnett v. Arnett*, 27 Ill. 247, 81 Am. Dec. 227. The dying person need not call these witnesses by name. 109 N. C. 114, 13 S. E. 889. And see *Prince v. Hazleton*, 20 Johns. 505; 6 Munf. 123; 10 Yerg. 501; *Offut v. Offut*, 3 B. Mon. 162, 38 Am. Dec. 183; 4 Rawle, 46, 26 Am. Dec. 115; *Wester v. Wester*, 5 Jones L. 95. The *rogatio testium* is indispensable. And see *Grossman's Estate*, 175 Ill. 425, 67 Am. St. Rep. 219, 51 N. E. 750; *Wiley's Estate*, 187 Penn. St. 82, 67 Am. St. Rep. 569, 40 A. 980. But cf. 6 B. Mon. 538. Nor should the will be constituted by words drawn out from the dying man by some interested party present; but the testament should appear to come freely and spontaneously from the dying man's own breast. Cf. *Brown v. Brown*, 2 Murph. 350; 2 Greenl. 298. The peculiarities of the Louisiana code with reference to nuncupative wills have already been noted. *Supra*, 365.

<sup>2</sup> 1 Eq. Cas. Abr. 404; 1 Wms. Exrs. 121.

<sup>3</sup> *Mitchell v. Vickers*, 20 Tex. 377; *Bolles v. Harris*, 34 Ohio St. 38. Among American States which still permit nuncupative wills to be made by non-privileged persons, some require three witnesses; but more commonly two witnesses may suffice. See 1 Jarm. 98, Bigelow's note; *Stimson's Am. Stat. Law*, § 2703. In Ohio the rule of competency and disinterestedness is more strongly insisted upon, under the statute, than in the case of written wills. *Vrooman v. Powers*, 41 Ohio St. 191.

<sup>4</sup> *Bundrick v. Haygood*, 106 N. C. 468, 11 S. E. 423; 41 Ohio St. 191; 84 Ga. 619, 20 Am. St. Rep. 383, 10 S. E. 1097.

Nuncupative wills of the privileged kind—those of soldiers, and mariners, and the wills of petty amount—the Statute of Frauds leaves without any definite number of witnesses to establish them. Such wills, it would appear, may, aside from legislation

376. (5) **As to the subsequent reduction of the will to writing.** The Statute of Frauds required the nuncupative words to be put into writing within six days after they were spoken; as otherwise the alleged will could not be proved after six months.<sup>1</sup> Similar legislation (with slight variation as to the number of days) may be found in our several States; and where the words reduced to writing are not substantially the same as spoken, the will may be pronounced invalid.<sup>2</sup>

377. (6) **As to strictness in establishing all the facts material to the probate.** Nuncupative wills, being as a rule no favorites of the court, demand strictness of proof on all essential points as to non-privileged persons, whether for the purpose of showing that the statute restraints have been fully complied with, or to establish facts fundamentally indispensable to the probate, independently of statute restraints. For, with or without a Statute of Frauds, evidence more strict and stringent than in the case of a written will should be furnished in every particular.<sup>3</sup>

378. (7) **As to whether informal writings may be upheld as nuncupative wills.** We have seen that holograph letters, unattested writings, and even mere memoranda were allowed a very loose operation as wills of personal property, long after the Statute of Frauds restrained nuncupative wills.<sup>4</sup> But now in England, as in most American States, the rule has been superseded.<sup>5</sup>

to the contrary, be proved in a court controlled by common-law rules, upon the testimony of a single unimpeached and competent witness. *Gould v. Safford*, 39 Vt. 498, where this rule was applied in favor of the nuncupative will of a soldier in actual service. But no one is a suitable witness for a nuncupative will unless competent as in other testamentary causes. *Supra*, 350; *Haus v. Palmer*, 21 Penn. St. 296. See *Young's Will*, 123 N. C. 358, 31 S. E. 626.

<sup>1</sup> Stat. 29 Car. II, § 19; 363, *supra*. See 2 Bl. Com. 501.

<sup>2</sup> *Bolles v. Harris*, 34 Ohio St. 38. And see *Mitchell v. Vickers*, 20 Tex. 377; *Haygood's Will*, 101 N. C. 574, 8 S. E. 222. This safeguard against fraud and failure of recollection applies in strictness only to the non-privileged wills; and for those of the privileged kind, we may assume that the usual common-law rules of evidence are applicable to prove or disprove them. 39 Vt. 505.

<sup>3</sup> *Wms. Exrs.* 121, 122; 1 Add. 389, 390. This consists with the cases noted in the preceding sections. See also *Smith v. Thurman*, 2 Heisk. 110; *Bolles v. Harris*, 34 Ohio St. 38; *Mitchell v. Vickers*, 20 Tex. 377; 84 Ga. 619, 20 Am. St. Rep. 383, 10 S. E. 1097; 41 Ohio St. 191; 106 N. C. 468, 11 S. E. 423; *Bingham v. Isham*, 81 N. E. 690, 227 Ill. 634; *Godfrey v. Smith*, 73 Neb. 756, 103 N. W. 450. But soldier's oral will admitted to probate notwithstanding a construction of doubtful phrase may be needful. *Scott's Goods*, (1903) P. 243.

<sup>4</sup> See *supra*, 253. See *Huntingdon v. Huntingdon*, 2 Phillim. 218; *Strish v. Pelham*, 2 Vern. 647. So has it been in American States upon a like theory, prior to the passage of local statutes which make a formal execution and attestation necessary. *Public Administrator v. Watts*, 1 Paige, 373; 4 Wend. 168.

<sup>5</sup> *Hebden's Will*, 20 N. J. Eq. 473; *Dockrum v. Robinson*, 26 N. H. 372; *Porter's Appeal*, 10 Penn. St. 254. Nor can a will executed as a written will, and defective in

379. (8) **As to the repeal or alteration of a written will by a nuncupative one.** This, we have seen, is expressly forbidden by the Statute of Frauds.<sup>1</sup> And under American codes, the revocation, total or partial, of a duly executed written will by an oral or nuncupative one is likewise prohibited.<sup>2</sup>

respect of execution, be set up as a nuncupative testament. *Rees v. Hawthorne*, 10 Gratt. 548. A signed writing is not a nuncupative will. *Stamper v. Hooks*, 22 Geo. 603, 68 Am. Dec. 511. Nor can a document drawn as a regular will, but not duly executed because death suddenly intervened, be now probated as a nuncupative will. *Male's Will*, 49 N. J. Eq. 266. But cf. 3 B. Mon. 162; 9 Gill, 44. But privileged wills, of personal property, and especially military testaments, may stand on a more favored footing in this respect; not because the will which is written down by the testator instead of being uttered is strictly of the nuncupative kind, but because the civil law dispensed freely with formalities in such testaments, and the common law is supposed to intend the same. Defective instruments in writing, letters in his own hand, declarations which some comrade is to write out and transmit by mail, and the like, have accordingly been upheld as suitable soldier's testaments, within the exception of our statutes relating to nuncupative wills, though no *rogatio testium* took place at all. *Gould v. Safford*, 39 Vt. 498; *ib.* 111; *Leathers v. Greenacre*, 53 Me. 561; 1 Abb. Pr. N. S. 112.

We should observe the specific language of such enactments: not that soldiers in actual service and mariners at sea may simply make a nuncupative will, but that they may dispose, etc., *in the same manner as before the act*; which expression may well embrace all means of thus disposing of personal property which the common law sanctioned. As to wills of petty amount, however, the local legislation, properly construed, may be found to permit of them only on the strict footing of "nuncupative wills," and not by way of letter or writing informally executed.

<sup>1</sup> Stat. 29 Car. II, § 22. But as to a lapsed legacy, see *T. Raym.* 334; *Com. Dig.* Devise C; 1 Wms. Exrs. 122. And see Book 2, *post*.

<sup>2</sup> *McCune v. House*, 8 Ohio, 144, 31 Am. Dec. 438; *Brook v. Chappell*, 34 Wis. 405. See Part IV, *post*, as to Revocation, etc.



## PART IV.

## REVOCATION, ALTERATION AND REPUBLICATION OF WILLS.

## CHAPTER I.

## REVOCATION OF WILLS.

380. A will once executed may be revoked during the testator's lifetime by various modes; the fundamental principle being that every will (because in the nature of a gift or donation) is ambulatory until the testator dies, and may meanwhile be superseded, altered, or simply set aside whenever by his own free and rational act suitably expressed the testator manifests a corresponding intention, or so changes his circumstances and state in life that the law must infer that intent out of justice to his new condition.<sup>1</sup> Hence we may consider revocation under two distinct leading aspects: (1) revocation by the testator's direct act; (2) revocation by inference of law, from acts or conduct of the testator not direct.<sup>2</sup>

381. The English Statute of Frauds provided that no written will should be repealed or altered by any words or will by word of mouth; that is to say, by testament merely nuncupative.<sup>3</sup> The sixth section of this celebrated act was still more explicit, in discountenancing doubtful revocations, so far as related to devises of land.<sup>4</sup> At the time of this enactment, and by virtue of its pro-

<sup>1</sup> As to wills not strictly revocable, because of mutual consideration, see Joint and Mutual Wills, Part V. *post*.

As to revocation under the Louisiana Code, following civil law provisions—express or tacit, general or particular—see La. Code, § 1691.

<sup>2</sup> Under the former head may be considered the effect of actually cancelling, destroying, or obliterating the will; also of making a later will or codicil inconsistent with the former; also of expressly revoking by such later will or codicil or by some other writing; all sufficient acts of direct revocation, in fact, whether by parol or writing, being here included. Under the latter head we consider more especially the effect of subsequent marriage and the birth of a child, or of marriage alone. There are important provisions bearing on this subject in the Statute of Frauds, which our modern codes, English and American, preserve and extend, with a view of reducing the compass of loose and uncertain testimony under this head as much as possible.

<sup>3</sup> *Supra*, 379; Act 29 Charles II (1676-77), § 22.

<sup>4</sup> That section declared that no devise in writing of land, etc., nor any clause thereof, should be revocable otherwise than by some other will or codicil in writing, or other

visions, no wills required an attestation except devises of lands.<sup>1</sup> But when the legislature prescribed for wills of personal property, for all wills in fact, the same solemn execution by the testator and a stated number of witnesses, the rule of written revocation conformed to the new policy.<sup>2</sup> In the United States the same policy has been quite generally favored; and provisions of this character, based in language upon the English Statute of Frauds but extended to wills of all kinds, are common to our legislation in every quarter of the land.<sup>3</sup>

382. **Oral or implied revocation is not recognized**, therefore, in modern practice, however emphatic of expression or intended to take absolute effect.<sup>4</sup> Still less can wills be made or revoked by legal implication from outward tokens of a decedent's change of personal feelings towards those concerned in his estate;<sup>5</sup> or by mere

writing declaring the same, or by burning, cancelling, tearing or obliterating the same by the testator himself, or in his presence and by his directions and consent; but all devises and bequests of land, etc., should remain and continue in force until the same were burnt, cancelled, torn or obliterated by the testator or his directions in manner aforesaid, or unless the same were altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses declaring the same. Act 29 Charles II, § 6. The effect of this enactment was to demand on the testator's part either one of those plain and palpable acts which naturally signifies a changed intention, and which requires no witness, because the act itself takes away or discredits proof of the will; or, instead, some other instrument in writing executed with all the formalities of the original one.

<sup>1</sup> See *supra*, 253.

<sup>2</sup> Under act 1 Vict. c. 26, § 20, it is declared accordingly, that no will shall be revoked but by another will or codicil, or by some writing executed like a will, or else by destroying the same.

<sup>3</sup> As to the several American codes on this subject, see Stimson's Am. Stat. Law, § 2672. In nearly all the United States it is expressly provided that no will, devise in a will, or codicil, can be revoked except by the burning, tearing, cancelling, destroying, or obliterating of the instrument. And this must be done by the testator; or, as most of our State legislatures provide, by some other person, in his presence, or by his direction. Some local varieties of language will be found. Ib.

Where a statute prescribes the mode by which a will may be revoked, evidence of its revocation by any other mode is inadmissible. 81 Ala. 418, 2 So. 145. We are to observe, however, that, as the language of the later English enactments reduces the scope of informal and inexplicit revocation once so liberally permitted, so does American legislation tend at this day, in the same direction, while codes differ, nevertheless, in fixing the standard, and use terms more or less comprehensive to denote it. Revocation by the testator's direct act is what these codes, English and American, seek to circumscribe; for, as we shall see, that revocation which the law implies from a changed condition in the testator's condition and circumstances, marriage more especially, is still a feature of our law. 424, *post*. And the testator's direct act of revocation ought in all cases to be accompanied with the intention to revoke.

<sup>4</sup> 1 Gratt. 161; Cro. Jac. 497; 4 Iowa, 520; 2 Johns. 31, 3 Am. Dec. 390; 2 Yeates, 170; 10 Ohio St. 204; Wittman v. Goodhand, 26 Md. 95; Jones v. Moseley, 40 Miss. 261, 90 Am. Dec. 327; Slaughter v. Stevens, 81 Ala. 418, 2 So. 145; Kirkpatrick v. Jenkins, 96 Tenn. 85, 33 S. W. 819. And see 5 Conn. 164; Goodsell's Appeal, 55 Conn. 171, 10 A. 557.

<sup>5</sup> Jones v. Moseley, 40 Miss. 261, 90 Am. Dec. 327 (reconciliation with a son after disinheriting him by will). But the act of cancelling or disposing may be explained in the light of the testator's feelings where the act is in doubt.

manifestations of an intention to make a different disposition at some future time.<sup>1</sup>

383. **As to burning, cancelling, tearing, obliterating, and the like, with suitable intention.**<sup>2</sup> Such are the modes to which one is confined who seeks to revoke by what he does to the will itself. It is obvious that utterly destroying the instrument so as to leave nothing which may ever be produced in evidence again is one method here contemplated, and the more favored if not the only favored one; and that the other method consists in leaving the instrument so cancelled or obliterated that an intent to revoke may well be inferred from its appearance. Certainly, if one means wholly to revoke, it is his best course to burn or tear up his will, so that no scrap of it shall remain behind him; for otherwise, with all his pains, he tempts those who are shown what was given them, and then cut off, to conjure up doubts whether he really cancelled, and thus plunge the estate into a doubtful contest.

384. **Whatever the means thus employed for defacing or destroying the will,** a free, sane, and rational intention to revoke must accompany the act on the testator's part, or the revocation will not be valid.<sup>3</sup> Statutes frequently express the idea that the revo-

<sup>1</sup> Rife's Appeal, 110 Penn. St. 232, 1 A. 226.

<sup>2</sup> "Burning, cancelling, tearing, or obliterating" is the language for which the Statute of Frauds sets the copy. Stat. Charles II, § 6. "Burning, tearing, or otherwise destroying" are the words of the Wills Act of Victoria, suggesting a narrower construction, but applicable more universally to wills, whatever the kind of property. Stat. 1 Vict. c. 26, § 20. Each American code employs its own terms, but generally some or all of the above.

<sup>3</sup> Thus, to use Lord Mansfield's illustration, if a man were to throw ink upon his will instead of sand, there would be no revocation of the will although the writing were irrecoverably gone. *Burtenshaw v. Gilbert*, Cowp. 52. Nor, we may add, would exposure of the will to destruction or defacement by insects, mice, acids, fire or water, through mere heedlessness, have this effect; and of course injury to the paper or its loss by act of God, or from any cause external and proximate without the testator's due sanction, constitutes no legal revocation. Or supposing a man having two wills of different date before him, should direct the former to be destroyed and by mistake the latter is cancelled. Cowp. 52; 1 P. Wms. 345; 4 S. & R. 295; *Strong's Appeal*, 63 A. 1089; 79 Conn. 123, 118 Am. St. Rep. 138, 6 L. R. A. (N. S.) 1107. Even where the will is torn up, under a mistaken impression that it is invalid, and then gathered up and preserved, it will remain in force. *Giles v. Warren*, L. R. 2 P. & D. 401. No revocation can be good which is procured by fraud or palpable error, or where the testator was unduly influenced to commit the act. *Supra*, Part II, c. 10; 1 Rich. (S. C.) 80; 1 Pick. 546, 547; *Rich v. Gilkey*, 73 Me. 595; *Batton v. Watson*, 13 Geo. 63, 58 Am. Dec. 504. And see 427a. And it is clearly settled that the revocation of a will while the testator is insane is no less void than the making of a will; because it requires the same capacity to revoke a will as to make one, and one cannot intend to destroy, in a legal sense, unless his mind acts rationally and to the point. *Harris v. Berrall*, 1 Sw. & Tr. 153; 1 Add. 74; *supra*, Part II; 427a; *Benson v. Benson*, L. R. 1 P. & D. 608; 3 Hagg. 754; 15 Mass. 115; 1 Tuck. (N. Y.) 205; 4 Barb. 28; 7 Dana, 94; 90 S. W. 1037, 111 Mo. App. 447; *McIntyre v. McIntyre*, 47 S. E. 501, 120 Ga. 67, 102 Am. St. Rep. 71; *Brunt v. Brunt*, L. R. 3 P. & D. 37; 9 Gill, 169, 52 Am. Dec.

cation of a will must be done "with the intention of revoking the same." Such expression is not, however, necessary; for it was long ago settled, upon construction of the Statute of Frauds, which used no language of the sort, that an act done without the mental intention to revoke was wholly ineffectual.<sup>1</sup> In short, the physical act itself is not conclusive, but open to explanation.

385. If a will were duly executed by a testator and afterwards destroyed by him or some one else, without the free and rational *animus revocandi* on the testator's part, such will may be established in probate on secondary proof of its contents; and a like rule applies to lost or missing wills.<sup>2</sup> Even where a testator tears up his will or codicil under the mistaken impression that he has not properly executed it, and orders a new and similar writing made out, but dies before executing it, the torn instrument is admissible to probate on the ground that an intent to revoke was wanting.<sup>3</sup> So may the will, or its pieces, be probated, where the testator tears the instrument while actually insane or under the coercion of another person.<sup>4</sup>

386. On the other hand, where the maker of a will, intending to revoke it, destroys the wrong paper, through the fraudulent conduct of others about him, the sufficient act of revocation being misapplied, the intent has been held to operate legally upon the true one.<sup>5</sup> But where the infirm testator directs some one else to destroy, and nothing is destroyed at all, no sufficient act appears upon which the court can fasten the intent to revoke; and his supposition that the direction was obeyed avails nothing.<sup>6</sup> Still less should a revocation be inferred from his own imperfect acts.<sup>7</sup>

685; 7 Humph. 92; Rich v. Gilkey, 73 Me. 595; Johnson's Will, 40 Conn. 587. See 107 Iowa, 750; Frear v. Williams, 7 Baxt. 550.

<sup>1</sup> Cf. Stat 1 Vict. c. 26, § 20; 2 Sw. & Tr. 497; Gow. 186; Jackson v. Holloway, 7 Johns. 394.

<sup>2</sup> Scruby v. Fordham, 1 Add. 74; 3 Hagg. 754; Batton v. Watson, 13 Geo. 63, 58 Am. Dec. 504; 50 Barb. 119. As to a will destroyed after the testator's death by one of his sons, but established in proof by the executor who collected the pieces, etc., see Leigh's Goods, (1892) P. 82. And see 402, *post*.

<sup>3</sup> Thornton's Goods, 14 P. D. 82.

<sup>4</sup> Hines's Goods, (1893) P. 282. And see McIntyre v. McIntyre, 47 S. E. 501, 120 Ga. 67, 102 Am. St. Rep. 71; Brassington's Goods, (1902) P. 1 (destroying when drunk and putting together when sober again).

<sup>5</sup> Pryor v. Coggin, 17 Ga. 444; Hise v. Fincher, 10 Ired. 139; Blanchard v. Blanchard, 32 Vt. 62; Smiley v. Gambill, 2 Head. 164.

<sup>6</sup> Malone v. Hobbs, 1 Rob. 346, 39 Am. Dec. 263; 3 Leigh, 32; 11 Ind. 95; Mundy v. Mundy, 15 N. J. Eq. 290; Trice v. Shipton, 67 S. W. 377, 23 Ky. Law, 2392; McBride v. McBride, 26 Gratt. 476. And see next section.

<sup>7</sup> Hill's Succession, 47 La. Ann. 329. Whether the testator's bare mistake, not induced by the fraud of others, can cause a paper to be revoked which he did not

387. **Inasmuch as revocation involves intention, the physical act must be performed** by the testator himself or under his sanction and direction. Nor is legislation silent on this point.<sup>1</sup>

388. **Attestation by witnesses** is not necessary to the burning, cancelling, tearing, or obliteration of the will by the testator. Indeed, a leading advantage which such means of revocation are supposed to afford consists in the secrecy permitted to the lawful disposer.<sup>2</sup> But various codes require proof by at least two witnesses where the act is done by some other person under the testator's direction.<sup>3</sup>

actually revoke, may well be doubted. For it is straining a rule, out of regard to justice, to detach the intent from the act: the general maxim being, that no intention to revoke can constitute a legal revocation unless the sufficient statute act accompany it. See 1 Redf. 1; 25 N. Y. 9; *Blanchard v. Blanchard*, 32 Vt. 62; cases *post*.

So, too, courts have not felt justified in setting a will aside on the plea that the coercion, fraud or undue influence of others prevented the testator from revoking it when he desired to; though possibly they would in a heinous case. *Floyd v. Floyd*, 3 Strobb. 44; *Smith v. Fenner*, 1 Gall. 170; *Graham v. Burch*, 47 Minn. 171, 174, 28 Am. St. Rep. 339, 49 N. W. 697, and cases cited. And it should be borne in mind, moreover, that one may ratify, republish, or keep in force the will which he once meant to revoke, but did not, by his own active or passive conduct, after the coercion is removed or the fraud or mistake discovered. *Taylor v. Kelley*, 31 Ala. 54; *Lamb v. Girtman*, 26 Geo. 625; *O'Neill v. Farr*, 1 Rich. 80. For if one's purpose is to revoke, he should pursue that purpose consistently to the end.

<sup>1</sup> The Statute of Frauds expressly requires the burning, cancelling, tearing, or obliterating to be done "by the testator himself, or in his presence and by his directions and consent;" and the substance, if not the phrase, of this requirement appears in later enactments, English and American. *Supra*, 381. Both presence and direction of the testator being thus essential where the act is performed by another, a will is not legally revoked, though destroyed by the testator's own order, if burned or torn where he did not or could not see or take cognizance of the deed done. *Dadd's Goods*, Dea. & Sw. 290; *Dower v. Seeds*, 28 W. Va. 113. See 2 Vern. 441; *Bennett v. Sherrod*, 3 Ired. 303, 40 Am. Dec. 410; 5 Redf. 376. No revocation by another without authority of testator. 72 N. Y. S. 415. A testator cannot delegate his power of revoking a will by inserting in it a clause which confers on another an authority to destroy it after his death; nor can he give such verbal authority. 6 Jur. 564; 1 Robert. 661; *White's Will*, 25 N. J. Eq. 501. Cf. *supra*, 293. Ratification by the testator of such a destruction, if lawful at all, is not readily to be inferred. *Mills v. Millward*, 15 P. D. 20. On the other hand, no fraud is committed by any person in destroying or assisting to destroy a will by the genuine express direction and in the presence of the testator, though apart from all others; for every testator has the right, while in the full possession of his faculties and acting freely, to destroy his own will at any time or in any manner he pleases, be it secretly or openly. *Timon v. Claffy*, 45 Barb. 438; *McCarn v. Rundall*, 82 N. W. 942, 111 Iowa, 406.

If a person, confided in, disobeys the testator's direction, though deceitfully, and preserves the will intact, no legal revocation takes place, for nothing is destroyed or cancelled. 1 Gratt. 161; 11 Ired. 95; *supra*, 386. Where the testator asks or sends for his will intending to revoke it, and it is not brought, no revocation is constituted. *Laycroft v. Simmons*, 3 Bradf. 35; *Mundy v. Mundy*, 15 N. J. Eq. 290. But a testator finding himself thus thwarted may usually execute a new will, or a revocation in writing, in presence of witnesses. And if an extreme case should show that by daring force or fraud, and against his protest, the means of revocation were utterly denied him, so that he could not execute his intention, the court would pronounce, perhaps, according to his wishes.

<sup>2</sup> *Timon v. Claffy*, 45 Barb. 438.

<sup>3</sup> *Stimson Am. Stat. Law*, § 2672.

389. **The utter destruction of one's will by burning, tearing, and the like**, the intent accompanying the act, supplies the simplest instance of revocation. Destruction is the only mode favored in this connection by the English Statute of Victoria and many American codes; defacement being deemed too dubious an act.<sup>1</sup> But the difficulty to solve, is whether statutes like these exclude, by inference, whatever destruction of the instrument falls short of annihilation or at least of rendering original proof of all its contents impossible.<sup>2</sup>

390. **Under the Statute of Frauds a very slight act of burning or tearing** might suffice for revocation if a genuine intention accompanied the act.<sup>3</sup> Where the testator arrests his own design before the act is completed, revocation does not take place.<sup>4</sup>

391. **Defacement by cancelling, obliterating, and the like** are more equivocal modes of revocation sanctioned by the Statute of Frauds, but discarded, because of their uncertain tenor, in the later enactment of Victoria.<sup>5</sup> Behind such defacement perhaps might

<sup>1</sup> Not only burning or tearing would satisfy such enactments, but cutting, throwing into the water, steeping in acids, and other equivalent destructive acts. *Hobbs v. Knight*, 1 Curt. 768; *Clarke v. Scripps*, 2 Rob. 563, 570, 575.

<sup>2</sup> Some have argued for this narrow construction. But the English courts of probate rule less strictly; and where the testator has cut out his own name from the will with clear intent to revoke it, this act is held a sufficient destruction; for an essential part of the will, an integer, is thereby destroyed, nor does the statute expression "otherwise destroying" necessitate a destruction of the entire instrument. 1 Curt. 768; *Clarke v. Scripps*, 2 Rob. 563. And see *Williams v. Tyley*, Johns. 530. So may destroying that part of the will which one would call the effective part constitute a sufficient revocation, if the full intent accompanied the act; or even tearing off the seal *animo revocandi*, though a seal is admitted to be no essential part of a will. *Gullan, Re*, 1 Sw. & Tr. 125; 26 Beav. 64; *Price v. Powell*, 3 H. & N. 341. But to cut out a particular clause or the name of a particular legatee or some minor part of the will, imports only a revocation *pro tanto*. L. R. 2 P. & D. 206, 401. See 397, *post*. So, too, the mutilation of a will by cutting out the executors' clause has been treated as simply revoking the choice of executors. *Maley's Goods*, 12 P. D. 134. As to pasting over, see *Horsford's Goods*, L. R. 3 P. & D. 211. Indeed, the English cases which construe the Statute of Victoria rely upon some act of destruction, which so far as it goes utterly effaces, and in order to revoke the whole will destroys some integral part essential to the entirety of that will. Tearing off signatures and attestation has this effect. *Lewis, Re*, 1 Sw. & Tr. 31. And see 1 Sw. & Tr. 125; 26 Beav. 64; 3 Sw. & Tr. 485. Scratching out signatures with a knife is a "destruction." 12 P. D. 141. Obliteration of the envelope of a will does not suffice. 2 Russ. 90. And of course the full intention to revoke should accompany the act, or no such consequence will follow. *Cheese v. Lovejoy*, 2 P. D. 251.

<sup>3</sup> But some burning or tearing, if only of a small part, or so as to scorch or mutilate the paper, was needful; mere intention or attempt did not fulfil the statute; and yet it mattered not that the writing was still legible in spite of the act, or the maker's disposition traceable by putting the torn pieces of his will together. *Doe v. Harris*, 8 Ad. & El. 1; 1 Jarm. 130; 2 W. Bl. 1043.

<sup>4</sup> 2 B. & Ald. 489; 2 Curt. 832; *Elms v. Elms*, 1 Sw. & Tr. 155.

<sup>5</sup> By that earlier legislation such acts as tearing off or effacing one's signature or seal at the end of the will were the common expression of a testator's intention to revoke, and required no such strain of interpretation as English courts must now

be read the entire will as originally executed, with names, in all its integrity; and though the testator left the instrument among his papers at his death, cut about and through, without any real mutilation of what was written therein, the purpose of cancelling, obliterating, or destroying made such revocation legally sufficient.<sup>1</sup> This whole subject bristles with practical difficulties, and we need only observe that, under the statute, some act must be done to the paper; that the revocation may be partial or total; and that cases have refined much upon obliterating the material part of a clause or sentence, such as the devisee's name, whereby the devise or gift becomes *ipso facto* revoked.<sup>2</sup>

392. On the other hand, no mere defacement or crossing out of the testator's signature, so as to leave it still legible, will satisfy the present Statute of Victoria; for this constitutes no destruction within the act.<sup>3</sup> Cancelling or mere obliteration constitutes no revocation, as the English law now stands; but the words as originally written must, to one who looks at the will, be quite illegible.<sup>4</sup>

393. The American doctrine in such respects, allowing for differences of local legislation, closely resembles that of England; and as a State enactment conforms to the looser or more rigid policy of cancellation, so must be the course of judicial precedents in that jurisdiction.<sup>5</sup>

apply. 1 Add. 78; *Lumbell v. Lumbell*, 3 Hagg. 568. Cf. 389. For if the act was not "destroying," it might at all events be reckoned as cancelling or obliterating the will. Drawing lines over the testator's name was likewise a sufficient cancellation within the earlier act. *Cas. temp. Lee*, 34. But cf. 2 Russ. 90. In fact, the principle appears to have been well established in the English courts before 1837 that if the testator intended to revoke by cancelling or obliterating, not to say destroying, his will, and he did all he meant to do by way of expressing that purpose, no literal cancellation or obliteration, and certainly no effacement, was necessary. 1 Wms. Exrs. 133.

As to using a lead pencil, see 18 Ves. 348; 5 Hare, 39; Hall, *Re*, L. R. 2 P. & D. 256; 63 A. 7; 1 Jarm. Wills, 134, 135.

<sup>1</sup> *Moore v. Moore*, 1 Phillim. 357.

<sup>2</sup> See *Swinton v. Bailey*, 4 App. Cas. 70; 3 B. & P. 16; 18 Ves. 350; 1 Jarm. Wills, 134, 135.

<sup>3</sup> *Benson v. Benson*, L. R. 2 P. & D. 172; 2 Curt. 458. See also *King's Goods*, 2 Robert. 403 (effect of one signature erased and another written and left).

<sup>4</sup> *Stephens v. Taprell*, 2 Curt. 458; 1 Jarm. Wills, 142; 6 Jur. N. S. 56; 1 Vict. c. 26, § 21. A writing declaring an intention to revoke, and executed as a will, may supplement a doubtful erasure. *Gosling's Goods*, 11 P. D. 79; 404. See c. 2, *post*, as to alteration of a will.

<sup>5</sup> Tearing off the seal of a will (needless as a seal may be for its proper execution) may constitute a revocation when the intent accompanies the act. 4 Mass. 460; 2 Nott & McC. 272. In *White's Will*, 25 N. J. Eq. 501, there was obliteration of signatures, besides tearing off the seal.

Where a will is signed several times, and also at the end, it is the last whose erasure repeals the will. *Evans's Appeal*, 58 Penn. St. 238. Drawing lines over the testator's name *animo revocandi* amounts furthermore in some States to revocation by cancelling

394. **But a will cannot be revoked by any mental intention of the testator**, even though such intention be evidenced by a written statement, unless the statutory forms, whatever those may be, are complied with.<sup>1</sup> Apart from that consideration, however, the broad inquiry must be, what, in view of the surrounding circumstances, the testator really intended; and revocation, whether of the whole instrument or a part, should be determined accordingly.<sup>2</sup> Such is the American doctrine, and it differs not from that of the mother country.

395. **The legal effect of an inchoate or incomplete act of burning, tearing, cancelling, etc.**, according as the local statute may have prescribed, presents great difficulty. But next to considering the limits which the local statute may have set to the act of revo-

even though his signature be still legible. *Baptist Church v. Robbarts*, 2 Penn. St. 110. Even the drawing of pencil-marks over the signature is held sufficient. *Woodfill v. Patton*, 76 Ind. 575, 40 Am. Rep. 289; *Townshend v. Howard*, 86 Me. 285, 29 A. 1077 (where there was corroborating proof besides). And see 133 Penn. St. 245; 19 Am. St. Rep. 640, 7 L. R. A. 209, 19 A. 482; 77 N. Y. S. 166. And tearing a will into several fragments will suffice, though the fragments be gathered up afterwards by another and preserved, unknown to the testator. *Sweet v. Sweet*, 1 Redf. 451.

Cancellation by drawing lines across is an equivocal act, however, and may be explained by circumstances and proof of intent. *Bethel v. Moore*, 2 Dev. & B. 311; *Smock v. Smock*, 11 N. J. Eq. 256. So again, must the intention of the testator decide whether an obliteration of the will is a revocation or not. *Jackson v. Holloway*, 7 Johns. 394; *Means v. Moore*, 3 McCord, 282. And see *Frear v. Williams*, 7 Baxt. 350. Erasures which do not materially affect the meaning or force of the will have not the effect of legal revocation. 34 Barb. 140. A careful interlineation cannot be pronounced an "obliteration" within the wills act. *Dixon's Appeal*, 55 Penn. St. 424. Nevertheless, cancelling or obliterating are acts very liberally construed at the old law; and as distinguished from destruction or defacing the writing so as to leave it illegible, the act implies that the instrument is still preserved in legible shape, but with something upon it which indicates that the will (or at least some portion of it, if revocation be *pro tanto*) has ceased to stand according to the testator's original intention. *Evans' Appeal*, 58 Penn. St. 238 (no "obliteration" so that words cannot be read here essential).

Slight acts accompanied by suitable intent formerly sufficed. 4 Cow. 483; 6 Ib. 377; 2 Nott & M. 272; 4 Kent Com. 582. Destruction of a principal part may serve for the whole, as in English cases. See *Müh's Succession*, 35 La. Ann. 394, 48 Am. Rep. 242.

<sup>1</sup> *Delafield v. Parish*, 25 N. Y. 9; *Blanchard v. Blanchard*, 32 Vt. 62.

<sup>2</sup> See *Cook, Re*, 5 Pa. L. J. 1, where the testator tore off his name at the foot of a codicil, and this was held, in view of the proof, to revoke the codicil only, and not the will on the reverse side of the paper; 111 Mo. App. 447, 90 S. W. 1037 ("burning"); *Glass's Estate*, 60 P. 186, 14 Col. App. 377; *Gardner v. Gardiner*, 19 Atl. 651, 65 N. H. 230, 8 L. R. A. 383.

But some of our later American enactments are quite as rigorous as that of Victoria, in confining simple revocation of the instrument itself to acts whose nature is to destroy. For, admitting that to "destroy" is not necessarily to annihilate, within such statute, there can be no destruction unless the essential words destroyed are rendered illegible; and as for merely cancelling by anything short of this effect, it cannot operate unless witnessed like a will. *Gay v. Gay*, 60 Iowa, 415, 46 Am. Rep. 78, 14 N. W. 238. And see *Howard v. Hunter*, 41 S. E. 638, 115 Ga. 357; *Knapen's Will*, 106 Md. 147, 66 A. 701; 77 N. Y. S. 178; 172 N. Y. 360, 65 N. E. 173.



cation, the cardinal inquiry relates to the intention which appears to have accompanied the testator's act. Moreover, as every court means to decide justly, and according to the real merits of the controversy, where it may, the inchoate or incomplete act is helped out if possible, when the fraud of others impaired its efficiency; but otherwise, when the testator alone was at fault in not doing all that the court asked of him to make his act positive and final.<sup>1</sup> An incomplete or inchoate act fails utterly when the intent was incomplete; nor can another's fraud be set up which the testator's own fault promoted.<sup>2</sup>

396. **The effect of complete intention may be contrasted with incomplete** where the act was equivocal, from various instances in the reports.<sup>3</sup> In all such cases it is of much consequence that the testator treats the burned or mutilated instrument as valid, for the rest of his life; for this circumstance indicates that a final and full revocation was never intended by him. And we apprehend that under strict statutes like that of Victoria, which require an act of "destroying," there must be some injury committed to the extent of destroying the entirety of the will or rendering a material part thereof illegible, else no revocation will occur.

397. **Acts of revocation affecting part only of a will** present an analogous difficulty in the doctrine we are discussing. The Eng-

<sup>1</sup> Thus, as to a testator's throwing upon the fire and another rescuing it, cf. *Bibb v. Thomas*, 2 W. Bl. 1043, and *Doe v. Harris*, 6 Ad. & El. 209 (the circumstances varying).

<sup>2</sup> *Ib.*; 387, *supra*.

American cases appear to justify our line of distinction. Thus, where the maker of a will threw it on the fire, meaning to destroy and revoke it, and it was burned through in three places without interfering with the writing, and the will was then rescued and preserved against his intention and without his knowledge, the court construed this into a sufficient revocation. *White v. Casten*, 1 Jones L. 197, 59 Am. Dec. 585. And see *Mundy v. Mundy*, 15 N. J. Eq. 290. But *Graham v. Burch*, 47 Minn. 171, 28 Am. St. Rep. 339, 49 N. W. 697, discountenances the idea of a formal destruction which the fraudulent device of another frustrated, where in fact the testator was careless and the will was put into a stove where no fire was lit for two hours after.

<sup>3</sup> One tears his will under a mistaken impression that its provisions are of no effect; then recovering himself he gathers the pieces together once more, and preserves them carefully, meaning that the instrument shall serve its original purpose. *Giles v. Warren*, L. R. 2 P. & D. 401. And see *Brassington's Goods*, (1902) P. 1 (drunk and then sober); *Sweet v. Sweet*, 1 Redf. 451. Here it has been held no complete revocation ever took place; and we may imagine similar cases, as where one's will is accidentally torn while destroying his old letters, and the testator takes the fragments from the waste-basket, and restores the paper. But another man tears his will, intending to destroy it; and his wife or adult child collects the pieces and puts them together again neatly, without his knowledge; here there is revocation, for though the fragments were not minute, the *animus revocandi* was complete, and fraud must not prevail against it. *Sweet v. Sweet*, 1 Redf. 451. And see 3 B. & Ald. 489 (impulse of anger overcome); *Elms v. Elms*, 1 Sw. & Tr. 155; *Giles v. Warren*, L. R. 1 P. & D. 401; *Coffee v. Coffee*, 46 S. E. 620, 119 Ga. 533. The minuteness of the tearing is of secondary consequence; though without some tearing revocation would not have occurred.

lish Statute of Victoria, while insisting upon some sort of destruction, appears to allow a part merely of the will to be revoked in that manner.<sup>1</sup> Under the older law one had a very liberal discretion to revoke his will in part, and annul some particular devise or bequest, if such was his actual intention, by obliterating or cancelling a particular clause, or even material words therein, the rest of the will standing as before, agreeably to his supposed intent.<sup>2</sup> This doctrine of partial revocation, even under the restrictions adopted by later English legislation, is not greatly favored in American codes at the present day.<sup>3</sup>

398. Another difficulty arises where the revocation depended upon another act, as the testator meant; as where a second will was to be substituted for the will revoked. Here the courts have tried to pursue the testator's intention and accept its guidance; a course which is often the harder for the reason that a testator's mind has not grasped the exigency at all.<sup>4</sup>

<sup>1</sup> 1 Wms. Exrs. 129; 2 Rob. 593, 597; *Christmas v. Whinyates*, 3 Sw. & Tr. 81.

<sup>2</sup> *Supra*, 391; Cowp. 812; 1 Add. 78; 3 B. & P. 16; *Swinton v. Bailey*, 4 App. Cas. 70. This law applied both to devises of land and written wills of personal property. 1b. The Statute of Frauds speaks of revoking a devise or "any clause thereof." Great license prevailed, in consequence, this privilege of the testator extending to altering or interlining the original instrument at pleasure so as in effect to make a new will, and that with very little formality. Drawing a pen across the name of a devisee or legatee might thus revoke the devise or bequest. *Mence v. Mence*, 18 Ves. 348. Cf. 8 Sim. 73. Under the Statute of Victoria such practice was checked by express provisions. 1 Vict. c. 26, § 21; ib. § 20. Yet it would appear that one may still revoke *pro tanto* under that act by tearing up or burning one or more sheets of his will (supposing it written on several sheets), as he was permitted to do by the Statute of Frauds, and still earlier by the common law. 1 Wms. Exrs. 128, 141, 143; *Scrubby v. Fordham*, 1 Add. 74; 3 Hagg. 552. And see next c. Though not if the rest of the will becomes unintelligible. *Leonard v. Leonard*, (1902) P. 243 (whole will revoked thereby).

<sup>3</sup> Many of our local enactments once pursued the language of 29 Car. II, so as to admit of revocation *pro tanto*; but of late years that language has undergone locally a change of expression. Various codes now drop all reference to revocation in part; and the general policy intimates that such changes of disposition require an instrument executed with all the formalities of a will. See 88 N. Y. 377, 42 Am. Rep. 254; *Stimson's Am. Stat. Law*, § 2672; *Eschbach v. Collins*, 61 Md. 478, 48 Am. Rep. 123; *Law v. Law*, 83 Ala. 432, 3 So. 752; *Miles, Re*, 68 Conn. 237, 36 A. 39, 36 L. R. A. 176; *Griffin v. Brooks*, 48 Ohio St. 211, 31 N. E. 743. But statutes differ, and the local code should be consulted. See *Bigelow v. Gillott*, 123 Mass. 102, 25 Am. Rep. 32; *Tomlinson's Estate*, 133 Penn. St. 245, 19 Am. St. Rep. 635, 7 L. R. A. 209, 19 A. 482 (an extreme case permitting revocation *pro tanto*); 22 N. J. Eq. 463; *Hubbard v. Hubbard*, 198 Ill. 621, 64 N. E. 1038; *Hull's Will*, 89 N. W. 979, 117 Iowa, 738.

<sup>4</sup> Cf. *Onions v. Tyrer*, 2 Vern. 742, where the substituted will was void for non-compliance with statute formalities, and the court ruled that the former will (which varied but slightly from it) should remain in force. But the principle was later extended. The principle appears to be this: that where the cancelling or destroying his first will was made by the testator to depend upon the validity of his second will or substitute, and the second will or substitute cannot legally take effect, such cancelling or destroying fails to operate as a revocation, even though the revoking act would *per se* have sufficed. See Cowp. 52; *Perrot v. Perrot*, 14 East. 440; 1 Add. 53; 1 Eq. Cas. Abr. 409; 3 ib. 778. And see *Stamford v. White*, (1901) P. 46. But this rule appears

399. If a testator executes his will in duplicate, keeping only one part, while his executor, attorney, or another in his confidence has custody of the other, the effect of destroying or cancelling one of such papers without the other may give rise to controversy.<sup>1</sup>

400. Where, again, there is a will and codicil, and the will appears to have been destroyed, but not the codicil, the question arises whether the act of revocation has annulled both instruments. This must be determined by circumstances.<sup>2</sup>

401. Where a will is found torn, mutilated or defaced at the testator's death, it is admissible to show that this was the result of use or accident, and not design on his part;<sup>3</sup> or that it was done by some one else without his direction and presence: for the vital

to be confined in modern practice to cases in which the testator evidently meant his revocation to depend upon the validity of the substituted will and where the two dispositions are closely connected, the one to make way for the other. Revocation, as an immediate and positive act, cannot be so dependent for its validity upon some ill-defined purpose which the testator cherishes to make another and a different will hereafter. For the mere indefinite purpose to make another will hereafter does not prevent an immediate revocation from taking effect. *Semmes v. Semmes*, 7 Har. & J. 388; 1 How. (Miss.) 336, 29 Am. Dec. 631; *Williams v. Tyley*, Johns. 530. And in general, a present revocation is quite consistent with some purpose to execute hereafter another will, which purpose is never really carried into effect. *Brown v. Thorndike*, 15 Pick. 338; *Johnson v. Brailsford*, 2 Nott. & M. 272. Nor does the cancelling of a new will restore the former one which has been finally cancelled and revoked. 4 Kent Com. 531. But see *c. post*, as to republication; 3 Jones L. 77.

Other instances may be adduced where dependent acts of revocation fail because that which was depended on gained no efficacy. See 1 Hagg. 153; *Eeles's Goods*, 2 Sw. & Tr. 600 (alterations in first will preparatory only). But if the second will or substitute be legally prepared and duly executed, so as to take the place of the cancelled instrument in probate, revocation is not hindered by a failure or disappointed operation of the second disposition through a legal construction of its terms or otherwise. 1 Kay & J. 665; *Quinn v. Butler*, L. R. 6 Eq. 225. And see *post*, 406; 1 Pick. 535; 91 P. 929, 40 Col. 332. Prudence suggests, on the whole, that a testator who prefers his old will to stand rather than die intestate, should carefully refrain from cancelling or destroying it until the new one has been executed in due form.

<sup>1</sup> Doubtless his true and safe course is to gain control of both papers and revoke them equally by one and the same act. But this is not essential; for where a testator cancels or destroys by a suitable act the paper in his own possession, it may be strongly presumed that he does not intend the duplicate to stand. Cowp. 49; 2 Phillim. 23; 8 C. B. 724; *Pemberton v. Pemberton*, 13 Ves. 310; *O'Neill v. Farr*, 1 Rich. 80; 2 Phillim. 23; 2 Hagg. 266. See *Snider v. Burks*, 84 Ala. 53, 4 So. Rep. 225 (duplicate lost); (1897) P. 40. On the other hand, if he has possession of both papers and destroys or mutilates one, leaving the other intact, the will may be presumed unrevoked. *Roberts v. Round*, 3 Hagg. 548; 13 Ves. 310. The strength of the presumption in equivocal acts will vary, however, according to circumstances; possession or non-possession of the duplicate being the element chiefly regarded, and yet not conclusive of the issue. 1 Jarm. Wills, 137, 138; 1 Wms. Exrs. 154-156; 8 C. B. 724; *Hubbard v. Hubbard*, 3 Ch. D. 738. See 1 Rich. 80.

<sup>2</sup> As in duplicate wills, a testator's custody of both instruments or of one only may go far to aid the solution. But supposing the testator to have kept possession of both papers or had equal access to them, the effect of revoking his will alone must turn mainly upon the dependence or independence of the codicil. Cf. *Tagart v. Squire*, 1 Curt. 289, and *Coppin v. Dillon*, 4 Hagg. 369; 2 Add. 116, 229; 1 Jarm. Wills, 139.

<sup>3</sup> 1 Jarm. Wills, 133; 2 Rob. 563; L. R. 2 P. & D. 206, 401.

question is, whether the testator meant thereby to revoke or not. And as bearing upon this question the treatment of the instrument, the place and period of its exposure, the character of the injury suffered, and other circumstances attending its production after the testator's death, may prove material where direct evidence of his intention is wanting.<sup>1</sup>

402. So, too, the presumption arises, if a will cannot be found after his death which the testator made, retaining its custody, that he destroyed it with the intention of revoking it; though such a presumption may be overthrown by circumstantial or other proof to the contrary.<sup>2</sup> Where, however, another person was the cus-

<sup>1</sup> See *Lawyer v. Smith*, 8 Mich. 411 (will twenty-five years old found in a barrel of waste papers after the testator's death); *Fellows v. Allen*, 60 N. H. 439, 49 Am. Dec. 328.

Yet the natural presumption arises, where the will remained in the testator's custody until his death, and then was found defaced, mutilated, or partially destroyed, that the act was done by the testator himself. *Christmas v. Whinyates*, 3 Sw. & Tr. 81; 1 Jarm. Wills, 133; *Patterson v. Hickey*, 32 Ga. 156 (evidence of intent freely admissible); *Smock v. Smock*, 11 N. J. Eq. 156; 47 Ohio St. 323, 21 Am. St. Rep. 820, 25 N. E. 209; *Cutler v. Cutler*, 40 S. E. 689, 139 N. C. 1; 29 So. 98 (Ala. 1900). From the appearance of the instrument as produced under such circumstances, however, active or passive conduct is inferable, as the case may be; but positive and active defacement or destruction warrants a conclusion, in the absence of other evidence, that the testator intended to revoke; though whether by an act sufficient or insufficient, statute construction must determine. 1 Wms. Exrs. 157; *Lambell v. Lambell*, 3 Hagg. 698; *Baptist Church v. Robbarts*, 2 Penn. St. 110. From the sufficient act the law further presumes the intention. 3 Hagg. 568; *Bell v. Pothergill*, L. R. 2 P. & D. 148. Where, however, the will remained in a different custody and inaccessible to the testator, it may rather be presumed that the defacement or destruction was not done by authority of law, that is to say, by the testator or in his presence and under his direction. *Bennett v. Sherrod*, 3 Ired. L. 303.

But all presumptions of this sort weigh lightly, and they may be rebutted by proof of the actual facts; declarations and conduct of the testator himself, the conduct and admissions of custodians of the will, and other material testimony aiding the investigation in a given case. The conclusion results that the testator fully intended to revoke, or else that his intention wavered and was never completely carried out, or once more, that he had no intention to revoke at all; and in this last instance, accident, the testator's own carelessness, or the carelessness or fraud of some one else may account for the appearance of the paper, and furnish to the triers a choice of inferences. And after all, a testator's full intention to revoke by what he does to the instrument may be thwarted by the insufficiency of his own act; and his intention may have been to revoke in part only or alter the will by a warranted or unwarranted exercise of discretion under the local statute, as the case may be.

<sup>2</sup> 1 Wms. Exrs. 157; 2 Phillim. 23; 3 Phillim. 126; L. R. 1 P. & D. 281, 309, 371; 3 Hagg. 184; 1 Curt. 289; *Finch v. Finch*, L. R. 1 P. & D. 871; *Weeks v. McBeth*, 14 Ala. 474; 11 Biss. C. C. 256; *Minkler v. Minkler*, 14 Vt. 125; *Foster's Appeal*, 87 Penn. St. 67, 30 Am. Rep. 340; 177 Penn. St. 218, 35 A. 558; *Mercer v. Mackin*, 14 Bush. 434; *Collyer v. Collyer*, 110 N. Y. 481, 6 Am. St. Rep. 405, 18 N. E. 110 (though only a brief opportunity); *Brown v. Brown*, 10 Yerg. 84; *Davis v. Sigourney*, 8 Met. 487; *Johnson's Will*, 40 Conn. 587; 98 N. C. 135, 3 S. E. 719; *Cheever v. North*, 106 Mich. 390, 58 Am. St. Rep. 499, 37 L. R. A. 561, 64 N. W. 455; *Boyle v. Boyle*, 158 Ill. 228, 42 N. E. 140. And so as to a duplicate. 2 Phillim. 23; 2 Hagg. 266; *supra*, 283, 399.

todian of the will, and the testator had not ready access to it, nor opportunity to destroy, there appears no such presumption.<sup>1</sup>

403. **Accompanying declarations of the testator, either verbal or written, may be shown** in issues of revocation as part of the surrounding circumstances evincing this intent.<sup>2</sup> And so, too, where the effect of doubtful acts of revocation is to be established.<sup>3</sup> But when the act done constitutes no legal revocation at all, his declarations of intent are superfluous and inadmissible.<sup>4</sup>

<sup>1</sup> See *Schultz v. Schultz*, 35 N. Y. 653, 91 Am. Dec. 88. The custodian's explanation may help clear the question. See 10 N. J. Eq. 196; *Behrens v. Behrens*, 47 Ohio St. 323, 21 Am. St. Rep. 820, 25 N. E. 209. And see as to testator's intervening insanity, *Sprigge v. Sprigge*, L. R. 1 P. & D. 608; 177 Penn. St. 218, 35 A. 558. If a will last traced to the testator's custody cannot be found at his death, the presumption that he destroyed it for the purpose of revocation outweighs the probability of its fraudulent and criminal destruction by another, when unsupported by any evidence except that of opportunity, though this latter circumstance is always worthy of consideration with other proof. *Bauskett v. Keitt*, 22 S. C. 187; *Collyer v. Collyer*, 110 N. Y. 481, 6 Am. St. Rep. 405, 18 N. E. 110. Where it is shown that the testator had been aware, while alive, that his will was lost when in his own custody, and yet, with ample opportunity, made no attempt whatever to reproduce or republish its contents, a court may fairly assume that he in reality revoked it. *Deaves's Estate*, 140 Penn. St. 242, 21 A. 395.

A sufficient act of revocation with sufficient intent being disproved or not presumable, the contents of the destroyed or missing will may be established upon secondary proof of its contents; as by draft, copy, or the testimony of the scrivener who wrote it, or other sufficient parol proof. 3 Sw. & Tr. 449; *Burls v. Burls*, L. R. 1 P. & D. 472; 1 P. & D. 431; 1 Phillim. 149; *Sugden v. Lord St. Leonards*, 1 P. D. 154; *Ford v. Teagle*, 62 Ind. 6. If the destruction of the will was procured by the compulsion or fraud of some third person, satisfactory proof, oral if need be, should also be furnished. As to jurisdiction of the probate or chancery court to admit a lost, suppressed or destroyed will upon proof, see 28 W. Va. 113, 57 Am. Rep. 646; 15 P. D. 170; 84 Ky. 259, 1 S. W. 637. And see 1 Wms. Exrs. 158; *Foster v. Foster*, 1 Add. 462; Exrs. post, 84; 3 Sw. & Tr. 449; 5 Conn. 164; 4 S. & R. 294. Statutes are found establishing the method of proving a lost or missing will, and containing various other provisions as to the procedure. See *Mosely v. Carr*, 70 Ga. 333; 4 Dem. 53. As to proof of a part only, cf. 1 P. D. 154; *Apperson v. Dowdy*, 82 Va. 776, 1 S. E. 105; *Woodward v. Goulstone*, 17 App. Cas. 469.

The contents of a lost will should be fairly proved. 66 Cal. 487, 6 P. 326. But not "beyond a reasonable doubt." 82 Ala. 352. One witness, or less than the attesting number may establish it. 82 Ala. 352, 2 So. 110; 118 Ill. 576, 59 Am. Rep. 395, 8 N. E. 852. But such a will should not be probated upon mere agreement of counsel. 6 Dem. 31. Nor upon mere hearsay and the declarations of the decedent. 50 Neb. 290, 38 L. R. A. 433, 69 N. W. 843. Nor upon proof differing materially. 6 Abb. N. Cas. (N. Y.) 234. As to proving a revocation of former wills by a later will, which is lost or destroyed, and whose contents cannot be proved other than the revocatory clause, see *Cunningham, Re*, 38 Minn. 169, 8 Am. St. Rep. 650, 36 N. W. 269, and cases cited.

<sup>2</sup> *Evans's Appeal*, 58 Penn. St. 238.

<sup>3</sup> *Patterson v. Hickey*, 32 Ga. 156; *Collagan v. Burns*, 57 Me. 446, 99 Am. Dec. 782; 8 Mich. 411, 77 Am. Dec. 460; *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322.

<sup>4</sup> *Gay v. Gay*, 60 Iowa, 415, 46 Am. Rep. 78, 14 N. W. 238; 2 Johns. 31, 3 Am. Dec. 390; *Hargroves v. Redd*, 43 Ga. 142; 34 Barb. 140; *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. 837. If the will be lost or missing, after the testator's death, his oral or written declarations are held admissible not only for rebutting any presumption that he had revoked the will, during his life, but also as tending to show by secondary proof, what were its contents. *Sugden v. St. Leonards*, 1 P. D. 154; *Keen v. Keen*, L. R.

404. **As to the revocation of a will by a subsequent will or a codicil.** So long as the disposer of property lives and enjoys testamentary capacity, he may make his will as often as he likes. The last will excludes *per se* every former disposition of a contrary or inconsistent nature, without requiring that the instrument annulled be destroyed as prudence dictates.<sup>1</sup>

405. **A will cannot as such revoke a prior existing will,** under our modern codes, unless properly signed and witnessed, though it should profess to dispose of the property differently.<sup>2</sup> If it revoke at all, it must be as some other writing within the statute, for it is neither will nor codicil.

406. **If the subsequent will disposes inconsistently, it operates to revoke** accordingly in whole or in part, as the case may be; and no express words of revocation are necessary.<sup>3</sup>

407. **But the later will does not revoke unless inconsistent;** and by the extent of such inconsistency must be measured the extent of the revocation. To operate a total revocation in such a case, the two dispositions must be so plainly inconsistent as to be incapable of standing together.<sup>4</sup> Only revocation *pro tanto* results

3 P. & D. 105; 6 P. D. 1; Johnson's Will, 40 Conn. 587; 8 Mich. 411, 77 Am. Dec. 460; Patterson v. Hickey, 32 Ga. 156; Pickens v. Davis, 134 Mass. 252, 258, 45 Am. Rep. 322; Steinke's Will, 95 Wis. 121, 70 N. W. 61; 93 Wis. 45, 67 N. W. 12; 117 Cal. 288, 59 Am. St. Rep. 179, 49 P. 192; Boyle v. Boyle, 158 Ill. 228, 42 N. E. 140; McDonald v. McDonald, 142 Ind. 55, 41 N. E. 336. But some of the latest decisions tend to restrain this latter principle, particularly where the testator's alleged declaration would thus constitute the sole proof. See Woodward v. Goulstone, 11 App. Cas. 469; Atkinson v. Morris, (1897) P. 40. See further, Olmsted's Estate, 122 Cal. 224, 54 P. 745 (will with cancellations).

<sup>1</sup> Legislation, English and American, commonly prescribes at this day that the later will, whether embracing real or personal property or both, must be signed and attested with all the solemnities of the local statute, in order to revoke a former will, or indeed to operate at all. *Supra*, 252, 253; Act. 1 Vict. c. 26, § 20. And see language of the various American codes on this point. See also 144 Mo. 119, 46 S. W. 139; 34 Mo. 400; 151 Ala. 536, 44 So. 389; 135 Iowa, 131, 112 N. W. 210; 40 Tex. Civ. App. 31, 88 S. W. 1113.

<sup>2</sup> Reese v. Court of Probate, 9 R. I. 434; 2 Bradf. 210; 15 Penn. St. 281, 53 Am. Dec. 597; Heise v. Heise, 31 Penn. St. 246; 2 Nott. & M. 482; Boylan v. Meeker, 2 Dutch. 274. See Besancon v. Brownson, 39 Mich. 388 (probate procedure here).

<sup>3</sup> 4 Wis. 254; 11 Phila. 130; 15 Hun, 410; Johns Hopkins Univ. v. Pinckney, 55 Md. 365; 6 Dem. 289; Bobb's Succession, 42 La. Ann. 40, 7 So. 60; 122 Ind. 134, 17 Am. St. Rep. 349; Teacle's Estate, 153 Penn. St. 219, 25 A. 1135; Cadell v. Wilcocks, (1898) P. 21. Yet an express revoking clause is to be recommended for insertion in all wills, so as not to leave the maker's intent to doubtful inference and litigation. See 417, *post*. The later will which thus revokes should be perfect in form and execution, and made freely and rationally; but its operation or non-operation from causes *dehors* the instrument would not affect the question. Snowhill v. Snowhill, 23 N. J. L. 447; Reade v. Manning, 30 Miss. 308; Laughton v. Atkins, 1 Pick. 535; 1 Rich. 80; 91 P. 929, 40 Col. 332 (widow electing against provisions); Dudley v. Gates, 125 Mich. 440, 83 N. W. 97.

<sup>4</sup> 1 Wms. Exrs. 162; 107 N. W. 925; 85 P. 84.

where the effect is that of partial inconsistency: it is like making a will and then adding a codicil; the final disposition reading by the light of both instruments together as a corrected whole.<sup>1</sup> For any number of testamentary instruments, executed at different times, may constitute one's "last will" in legal effect.<sup>2</sup>

408. **The intention to revoke must be immediate, and not prospective or dependent,** in order to take effect. Thus, a will confined to other property, which intimates an intention to re-dispose of what the first will bequeathed, by a codicil to be hereafter made, constitutes no present revocation of the first will.<sup>3</sup> And the license formerly granted to wills of personalty informally executed, whereby one's mere instructions for a subsequent will might in an extreme case operate *ipso facto* to revoke an earlier one, is discountenanced by the policy of modern codes.<sup>4</sup>

409. **The use of a codicil is appropriate for mere amendment or a *pro tanto* revocation** of the will, while an instrument which revokes completely all one's former wills is rather to be described as a substantive will.<sup>5</sup> The courts incline to so construe doubtful cases as to preserve, wholly or in part, the contents of the prior will rather than pronounce for a total revocation by inference.<sup>6</sup>

<sup>1</sup> 2 Hagg. 235; 1 Macq. H. L. 163; Lamage v. Goodban, L. R. 1 P. & D. 57; Hellier v. Hellier, 9 P. D. 237; 1 Pick. 535, 543; Floyd v. Floyd, 7 B. Mon. 290; 8 Cow. 56; 28 Vt. 274; Fleming v. Fleming, 63 N. C. 209; 28 Penn. St. 23; Scott v. Fink, 45 Mich. 241, 7 N. W. 799; 1 Atl. Rep. 845; 15 N. J. Eq. 359; 153 Penn. St. 219, 25 A. 1135; Pilsbury's Will, 79 N. E. 1114, 186 N. Y. 545.

<sup>2</sup> But see 1 Wms. Exrs. 163, 164, and citations as to some doubtful cases of "implied" revocation. And see Hellier v. Hellier, 9 P. D. 237.

The appointment or non-appointment of new executors has little real bearing on such issues. 1 Phillim. 412; 1 B. Mon. 56; Bailey, *Re*, L. R. 1 P. & D. 628. On the other hand, where a codicil entirely revokes the will except as to the appointment of executors, the will remains *pro tanto* valid, and both instruments require probate. Newcomb v. Webster, 113 N. Y. 191, 21 N. E. 77.

The governing principle in all such cases is the testator's apparent intention. And one's intention in making a new will may have been to dispose of other property or make new provisions perfectly consistent with the former will or else to thereby revoke *pro tanto* by amendment; it does not follow that a full revocation was intended. If the subsequent will substantially disclaims any intention to revoke, still less should revocation ensue. The cases sometimes turn upon a very nice construction of phrases which are supposed to indicate what the testator intended. See 3 Mason, 456; Sykes v. Sykes, L. R. 4 Eq. 200; Rife's Appeal, 110 Penn. St. 232, 1 A. 226. And see Gordon v. Whitlock, 92 Va. 723, 24 S. E. 342 (holographic revocation).

<sup>3</sup> 2 East, 488; 1 Jarm. 171. Cf. Brown v. Thorndike, 15 Pick. 388.

<sup>4</sup> 1 Wms. Exrs. 161; 1 Cas. temp. Lee, 509; Helyar v. Helyar, 1 Phillim. 430. See Olmsted's Estate, 122 Cal. 224, 54 P. 745; Williams v. Williams, 142 Mass. 515, 8 N. E. 424.

<sup>5</sup> But will or codicil should be duly executed.

<sup>6</sup> Freeman v. Freeman, Kay, 479; Howard, *Re*, L. R. 1 P. & D. 636. See 1 Jarm. Wills, 175; 2 Curt. 468; 4 Moore P. C. 29.

The intention to revoke may be collected from informal expressions, though not from ambiguous ones. Cf. Gordon v. Hoffman, 7 Sim. 29; Pilcher v. Hole, 7 Sim. 208;

410. **Where revocation is under some false or mistaken assumption of facts**, which is discoverable from the face of the papers, the revocation by subsequent will does not take effect. As if one should by a later will repeal legacies given by an earlier one to his grandchildren, "they being all dead," when in fact they are living;<sup>1</sup> or should confer benefits upon one described as husband or wife, who turns out not to be legally a spouse by reason of some prior and still existing marriage;<sup>2</sup> or should treat the gift as made to A in the original will when it was made to B.<sup>3</sup> Where no mistaken assumption appears, but a testamentary purpose founded upon some recognized doubt or accompanied by a mere misdescription of the person, or stating grounds of whose falsity or truth the testator judged for himself, this rule does not apply.<sup>4</sup>

411. **Where two contradictory wills are found bearing the same date**, or without any date at all, and nothing can be shown to establish relationship or priority in one or the other, both must be treated as void, and intestacy is the harsh result.<sup>5</sup> But the court avoids this conclusion if possible, by collecting some consistent scheme of disposition from both papers, or determining their true sequence.<sup>6</sup> And it should be borne in mind that two papers, duly executed, may have the substantial force of a single testamentary disposition.<sup>7</sup>

412. **Where a will which cannot be found and produced is relied upon as revoking by implication a former one**, its contents should be clearly established.<sup>8</sup> And the mere fact that a later will was

1 Jarm. 182. And in case of doubt, provisions by a later will appear to be presumed additional and cumulative, rather than intended as a substitute and by way of revocation. 1 Wms. Exrs. 167. And see Reichard's Appeal, 116 Penn. St. 232, 9 A. 311; Thomas v. Levering, 73 Md. 451, 21 A. 367, 23 A. 3; Gelbke v. Gelbke, 88 Ala. 427, 6 So. 843. A codicil revokes only so far as it is clearly inconsistent with the former will. Vestal v. Garrett, 64 N. E. 345, 197 Ill. 398 (unless expressly revoking); Blakeman v. Sears, 51 A. 517, 74 Conn. 516.

<sup>2</sup> 3 Ves. 321; Crossthwaite v. Dean, L. R. 5 Eq. 245.

<sup>3</sup> 4 Ves. 802; 10 Ad. & El. 228.

<sup>4</sup> Barclay v. Maskelyne, 1 Johns. (Eng.) 124.

<sup>5</sup> See 1 Jarm. Wills, 183, citing 10 Ad. & El. 228; Hayes v. Hayes, 21 N. J. Eq. 265; Skipwith v. Cabell, 19 Gratt. 758.

This non-revocation cannot be set up by showing mistakes not discoverable from the face of the testamentary papers; and it is held that not only the mistake must be thus apparent, but what the will of the testator would have been except for the mistake. Gifford v. Dyer, 2 R. I. 99, 57 Am. Dec. 708.

<sup>6</sup> Phipps v. Anglesea, 7 Bro. P. C. 43.

<sup>7</sup> 1 Jarm. Wills, 175; 1 Wms. Exrs. 166.

<sup>8</sup> 280. As to duplicate wills executed on the same day, see Odenwaelder v. Schorr, 8 Mo. App. 458; Crossman v. Crossman, 95 N. Y. 145. And as to a copy see Birks v. Birks, 34 L. J. 90.

<sup>9</sup> 1 Wms. Exrs. 162; Cutto v. Gilbert, 9 Moore P. C. 131; 2 Demarest, 421; 11 Biss. C. C. 256; 1 Bay (S. C.) 464.



made by no means justifies the inference that it revoked in effect, without proof of its actual contents.<sup>1</sup>

413. **Whether the revocation of a later will can revive the earlier one** still uncanceled has long been discussed in courts, English and American. The conclusion has been variously announced, and the fundamental difficulty appears to consist in trying to catch the testator's intention each time by laying down a general principle. The English common law tribunals stated a rule, under Lord Mansfield's lead, which has been thought more inflexible than that favored by ecclesiastical courts: viz., to the effect, that if a testator keeps his first will undestroyed and uncanceled, makes a second will virtually or expressly revoking it, and then destroys or cancels the second will only, thus repealing his revocation, the first will thereupon revives and continues in force.<sup>2</sup> But the ecclesiastical courts announced that in all such cases the testator's intention should be the guide, and the decision left to depend upon facts and circumstances.<sup>3</sup>

414. **In this discrepancy of authorities, the statute 1 Vict. c. 26, undertook**, in 1837, to establish a rule for the future. It provides that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed as required by the act, and showing an intention to revive the same.<sup>4</sup> This puts an end in England to all discussions of obscure intent on this point, and brings the courts of that country upon harmonious ground such as they never occupied before.<sup>5</sup>

<sup>1</sup> 3 Mod. 203; 1 Show. 537, affirmed in Shaw. Cas. Parl. 146. See *Brown v. Brown*, 8 El. & Bl. 876. And see 3 Barb. Ch. 158; *Peck's Appeal*, 50 Conn. 562, 47 Am. Rep. 685; *Cheever v. North*, 106 Mich. 390, 58 Am. St. Rep. 499, 37 L. R. A. 561, 64 N. W. 455; *supra* 402; *Kern v. Kern*, 55 N. E. 1004, 154 Ind. 29. It has been well established, though not without a struggle, that unless the tenor of a later and missing will can be ascertained, by clear secondary evidence of its contents, revocation of the earlier one which still exists uncanceled is not to be inferred when proof of such revocation is wanting. 1 Wms. Exrs. 166; cases *supra*.

<sup>2</sup> *Harwood v. Goodright*, 1 Cowp. 91; 4 Burr. 2512.

<sup>3</sup> *Usticke v. Bawden*, 2 Add. 125. And see *Moore v. Moore*, 1 Phillim. 412; 3 Phillim. 554. The English common law courts have questioned Lord Mansfield's opinion above, and possibly he may have been misreported. See 1 Wms. Exrs. 178, 179, notes. Whether the bias or presumption differs here, as between a later will, simply inconsistent, and one with an express clause of revocation, see Jarman's note cited in 134 Mass. 254.

<sup>4</sup> Act 1 Vict. c. 26, § 22; 1 Wms. Exrs. 180.

<sup>5</sup> Since this enactment operated, the uniform rule has been that after the execution of a subsequent will which contains an express revocation, or which by reason of inconsistent provisions amounts to an implied revocation of the former will, such former will cannot be revived by the simple cancellation or destruction of the later will, 3 Curt. 432; *Brown v. Brown*, 8 El. & Bl. 876; *Wood v. Wood*, L. R. 1 P. & D. 309.

415. In the United States, a like discrepancy of opinion is found in the several States whose courts have considered the subject; and legislation in some localities resolves the dispute substantially as the English Statute of Victoria has done.<sup>1</sup>

416. A testator may hold his mind in suspense as between two or more wills or codicils duly executed, and then upon his final decision which shall stand make revocation apply to the rest; and in such case his intention will take effect.<sup>2</sup> A revocation may be conditional or dependent.<sup>3</sup>

417. Now, to consider the express revocation of an earlier will by words or a clause contained in the later one.<sup>4</sup> As a rule, a

No strict distinction is here preserved between an express or an implied revocation of the earlier will by the later one. 1 Wms. Exrs. 181. See *Hodgkinson's Goods*, (1893) P. 339.

<sup>1</sup> See 4 Kent Com. 532; 134 Mass. 256, 45 Am. Rep. 322, *per* Allen, J.; *Rudisill v. Rodes*, 29 Gratt 147; *Beaumont v. Keim*, 50 Mo. 28; 108 Cal. 688, 41 P. 771. The policy of these enactments being that an earlier will once revoked ought not to be revived by the revocation of a later will, we may consider Lord Mansfield's theory as in the main disapproved. For even in States whose courts are left without such guidance, we find that, on the whole, the ecclesiastical is preferred to the common-law doctrine. Particularly is that doctrine of non-revival asserted, where the later will which became revoked contained an express clause of revocation; and numerous decisions are put expressly on the ground that the later will revoked thus, and not by mere implication. 3 Conn. 576; 26 Barb. 68; *Colvin v. Warford*, 20 Md. 357, 391; *Harwell v. Lively*, 30 Ga. 315, 76 Am. Dec. 649; 1 How. (Miss.) 336, 29 Am. Dec. 631; *Scott v. Fink*, 45 Mich. 241, 7 N. W. 799; *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322; 2 Dall. 266, 286, 290, 1 L. Ed. 375, 384, 386; *Flintham v. Bradford*, 10 Penn. St. 82; *Moore's Will*, 65 A. 447 (N. J. 1907). If, therefore, a will which was duly executed, and which contained a clause expressly revoking all former wills, be cancelled or destroyed, the preponderance of American opinion is that the former will is not thereby revived, in default at all events, of affirmative evidence that the testator so intended. But in the absence of statute direction, the courts treat the question of revival as one of intent, to be gathered from all the circumstances. It is sometimes argued rather fancifully that the revoking clause of a former will takes effect only at the testator's death, and hence that his intentional destruction of the later will should leave the former in force. *Bates v. Hacking*, 68 A. 622 (R. I. 1908); *Stetson v. Stetson*, 66 N. E. 262, 200 Ill. 601, 61 L. R. A. 258 (statute). And see *Colvin v. Warford*, 20 Md. 357; *Scott v. Fink*, 45 Mich. 241, 7 N. W. 799; 106 Mich. 391, 58 Am. St. Rep. 499, 37 L. R. A. 561, 64 N. W. 455; *Peck's Appeal*, 50 Conn. 562, 47 Am. Rep. 685. But see *contra*, *Danley v. Jefferson*, 150 Mich. 590, 114 N. W. 470 (intent of testator to revive disregarded); *Noon's Will*, 91 N. W. 670, 115 Wis. 299, 95 Am. St. Rep. 944; *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322, and cases cited. As to the intent as a governing test, see further *Williams v. Miles*, 94 N. W. 705, 68 Neb. 463; *Gould's Will*, 47 A. 1082, 72 Vt. 316; *Kern v. Kern*, 55 N. E. 1004, 154 Ind. 29; *Lane v. Hill*, 44 A. 393, 68 N. H. 275, 73 Am. St. Rep. 591; *Marsh v. Marsh*, 3 Jones L. 77, 64 Am. Dec. 598 (evidence of intent clear); *McClure v. McClure*, 86 Tenn. 173, 6 S. W. 44 (a third will intended but not made).

On the other hand, there are a few States in which Lord Mansfield's rule has been upheld; so that the earlier will revives upon cancellation of the later one. See *Taylor v. Taylor*, 2 Nott & McC. 482; *Randall v. Beatty*, 31 N. J. Eq. 643 (an express revocation).

<sup>2</sup> *Williams v. Williams*, 142 Mass. 515, 8 N. E. 424; *Bradish v. McClellan*, 100 Penn. St. 607.

<sup>3</sup> 71 N. E. 384, 210 Ill. 404.

<sup>4</sup> This furnishes a more prompt and positive mode of repealing than simply to provide differently by the new will and trust to inferences. Indeed, no well-drawn

general clause of revocation contained in the later will operates as expressed, namely, so as to revoke all prior testamentary acts of the testator; but such full revocation must consist with the apparent intent.<sup>1</sup> Whether an express clause of revocation shall operate totally or partially, or whether it is imperative or the reverse, is a question of construction, and often a nice one, to be gathered from a study of all the instruments concerned, with a view of discovering the testator's intention.<sup>2</sup>

418. **In order to make the revocation clause operate which a new will contains,** the will itself should be properly executed according to the statute requirements;<sup>3</sup> and, of course, it should be the product of a free and rational mind.<sup>4</sup>

419. **The right of express revocation by some other writing, not strictly testamentary,** is recognized by our wills acts, whereas the revoking instrument above described is a will, or rather a clause in a will, and requires probate.<sup>5</sup>

testament omits at the present day a clause of revocation; whether expressed so as absolutely to revoke all wills made by the testator at any former time, or in a partial sense, as where a codicil revokes the former will so far as inconsistent therewith, and in other respects ratifies and confirms it. Words and clauses of express revocation operate according to their obvious tenor, and strengthen the proof disclosed by inconsistent provisions contained in the new will.

<sup>1</sup> See 410, *supra* (revocation under a false assumption of facts). A declaration of intention to revoke in the future, or contingently, or with an unsettled purpose, is not a present express revocation. 2 East, 448; 15 Pick. 388; 7 Harr. & J. 388; Hamilton's Estate, 74 Penn. St. 69; 60 Penn. St. 177, 8 Am. Rep. 238. Cf. 1 Curt. 580. What is once clearly given must be clearly taken away or cut down, in order to be effectually taken away or cut down at all. 8 Bing. 479; 1 Cl. & F. 20; Kiver v. Oldfield, 4 DeG. & J. 30; 99 Ky. 273, 35 S. W. 926; Bradhurst v. Field, 135 N. Y. 564, 32 N. E. 113.

<sup>2</sup> See next c.; Cookson v. Hancock, 2 My. & Cr. 606; 1 Bradf. 114; Viele v. Keeler, 129 N. Y. 190, 29 N. E. 78.

<sup>3</sup> Laughton v. Atkins, 1 Pick. 543; 2 Bradf., 210; Heise v. Heise, 31 Penn. St. 246.

<sup>4</sup> O'Neill v. Farr, 1 Rich. 80; Rudy v. Ulrich, 69 Penn. St. 177, 8 Am. Rep. 238; Rich v. Gilkey, 73 Me. 595; Lyon v. Dada, 86 N. W. 946, 127 Mich. 395.

If the second will be properly executed by one of suitable capacity, the clause of revocation contained therein will operate, even though the second will should fail of its intended effect by reason of the incapacity of the beneficiary named in it, or public policy or any other matter *dehors* the will. 406, *supra*; 1 Kay & J. 665; Price v. Maxwell, 28 Penn. St. 23; Hairston v. Hairston, 30 Miss. 276; 2 Brev. 279; 5 Jones Eq. 46 (public policy). And even though the revoking will should make no disposition of the property disposed of by the will revoked, the clause of revocation will have its full effect. Thompson, *Re*, 11 Paige, 453; Bayley v. Bailey, 5 Cush. 245.

<sup>5</sup> Laughton v. Atkins, 1 Pick. 535; Rudy v. Ulrich, 69 Penn. St. 177, 8 Am. Rep. 238.

Anglo-Saxon law has long cherished the policy that a transaction by solemn instrument ought not to be subverted by an instrument less solemn. And, accordingly, the same Statute of Frauds which ordained that devises of land should not be good unless formally signed by the testator and attested in the presence of three witnesses, provided further that devises should not be revoked in writing save under substantially the same conditions; so that whether by will or some other distinct writing, the

420. A will of personal property alone might formerly be revoked by an unattested, or even unsigned, writing which made the intention clear; and even where a will disposed of real and personal estate together, a similar instrument would take effect upon the gifts and bequest of personalty, though otherwise inoperative.<sup>1</sup>

421. The declaration of an intent to revoke by some future act amounts, of course, to no actual revocation.<sup>2</sup> But the terms of any writing which imports a revocation should be construed according to its obvious intent and the subject-matter rather than the strict phraseology in which it is couched; hence hypothetical words in such instruments may well consist with the idea that a new will is proposed, and yet the writing in question shall operate notwithstanding as an actual and present revocation without waiting for it.<sup>3</sup>

422. Under the latest legislation, English and American, informal, unattested writings which purport to revoke are generally abolished. As public opinion in both countries has advanced to the requirement that all wills without distinction of the property to which they relate shall be regularly and uniformly signed and attested, so has the disposition grown to admit of no express revocation by writings less solemn. Upon this newly extended rule of policy rest the modern Statute of Victoria and most local enactments in the United States now in force.<sup>4</sup>

signature and the three witnesses were alike indispensable. Act 29 Car. II, c. 3, § 6. See 1 Jarm. Wills, 167, 168. This principle of legislation was early adopted in the American colonies. As to after-acquired property, see *Morey v. Hoitt*, 63 N. H. 507, 3 A. 636, 56 Am. Rep. 538; 63 N. Y. S. 544. And see 427, *post*: *Brown v. Thorndike*, 15 Pick. 388.

<sup>1</sup> *Brown v. Thorndike*, 15 Pick. 388. See *ante*, 252, 253; Stat. Frauds, Act 29, Car. II, §§ 6, 22. To give this effect, no peculiar form of words was requisite. The testator might in some convenient part, usually at the foot of the original will, write "this will is hereby cancelled," or "this will is invalid," and if he signed it, so much the better. 66 S. W. 1127, 108 Tenn. 234, 91 Am. St. Rep. 751, 56 L. R. A. 654; *Warner v. Warner*, 37 Vt. 356; *Johnson v. Brailsford*, 2 Nott & McC. 272, 10 Am. Dec. 601; *Semmes v. Semmes*, 7 Harr. & J. 388; *Witter v. Mott*, 2 Conn. 67. To write "obsolete" on the margin of the will is not enough. 2 W. & S. 455. Cf. 1 Call. 479. A single word written on the will which manifests an intention to annul it, so courts have ruled, effects a repeal. *Evans's Appeal*, 58 Penn. St. 238; 1 Demarest (N. Y.) 484. Partial revocation, too, may be manifested by writing suitable words across or against the legacy to be cancelled. See *supra*, 397. And as to paper not executed properly as a will, though sufficient for an express revocation, see *Clark v. Ehorn*, 2 Murph. 235. But cf. 418 *supra*; 9 R. I. 434; *Stickney v. Hammond*, 138 Mass. 116.

<sup>2</sup> 2 East, 487; *supra*, 417; *Ray v. Walton*, 1 A. K. Marsh, 71.

<sup>3</sup> *Brown v. Thorndike*, 15 Pick. 388, 408. See *Bates v. Hacking*, 28 R. I. 523, 125 Am. St. Rep. 759, 14 L. R. A. (N. S.) 937, 68 A. 622; *Hibberd v. Trask*, 67 N. E. 179, 160 Ind. 498. If an instrument is to take effect only on the happening of an event which does not transpire, it cannot revoke a will already executed and existing. *Hamilton's Estate*, 74 Penn. St. 69; 69 Penn. St. 177, 8 Am. Rep. 238.

<sup>4</sup> See Act 1 Vict. c. 26, § 20. Many American statutes require in such case "some other writing signed, attested, and subscribed in the same manner that is required

423. A written revocation requires in proof the same kind and measure of evidence as the probate of a will requires.<sup>1</sup>

423a. A will is not revoked by a subsequent instrument which was intended to confirm it.<sup>2</sup>

424. Finally, as to revocation of a will by inference of law. The most striking instance under this head is afforded by the marriage of the testator. If a woman makes a will and afterwards marries, her will is revoked by force of the marriage. This has been the time-honored rule of the common law; resting not upon mere presumption, but upon the material change which marriage works in the circumstances and condition of every woman, and the new interests she sustains by the very act of taking a husband.<sup>3</sup> This change of condition was doubtless greater under the old rules of coverture which placed the wife under her husband's protection, disabled her from disposing by will or contract without his sanction, and cast her property into a mould convenient for giving the

in the case of a will." See Mass. Pub. Stats. (1882) c. 127, § 8; Noyes's Will, 61 Vt. 14, 17 A. 743. Revocation under such statutes may be by express writing testamentary or not testamentary; but in either case and with reference to real and persona. property alike, the instrument must be executed with the formalities prescribed for a will; it must be signed by the testator and attested by a stated number of witnesses. The mere preparation of a new will because of dissatisfaction with the former one can, under such a policy, operate no revocation, where the testator died before the new will could be executed. Voorhis's Will, (N. Y.) Am. Dig. 1889; 101 N. W. 144, 125 Iowa, 424; Castens v. Murray, 50 S. E. 131, 122 Ga. 396; 100 N. Y. S. 344; 77 N. E. 446, 221 Ill. 252. A notable consequence of such legislation is, that signed and attested writings which expressly revoke are in some instances wills, requiring probate as such; and in others, writings which are no wills, nor admissible to probate; the line of distinction, however, being sometimes difficult to trace. 296, *supra*; Rudy v. Aldrich, 69 Penn. St. 177, 8 Am. Rep. 238. Simple words of repeal and cancellation written upon a will may still have the force of an express revocation as formerly; not, however, unless signed and attested as the local statute directs. Gugel v. Vollmar, 1 Dem. (N. Y.) 484 (attempt was to revoke part of the will). Under the Act of Victoria, a codicil was considered revoked by erasure and a writing signed by the testator and two witnesses to the effect that they had witnessed the erasure. Gosling's Goods, 11 P. D. 79. See also Thurston v. Prather, 77 S. W. 354, 25 Ky. Law, 1137; 55 A. 763, 205 Penn. 632; Akers's Will, 66 N. E. 1103, 173 N. Y. 620 (holographic indorsement insufficient); 42 S. E. 387, 115 Ga. 1004.

In certain States where holograph wills are favored, an attested will not written by the testator may be revoked by his holographic codicil. 78 Cal. 477, 21 P. 8.

<sup>1</sup> Noyes's Will, 61 Vt. 14. See also Burns v. Travis, 117 Ind. 44, 18 N. E. 45. Parol evidence of an intention to revoke or change one's will or evidence *abunde* has been admitted in cases where the papers themselves left the point in doubt. Jenner v. Finch, L. R. 5 P. D. 106. And see Methuen v. Methuen, 2 Phillim. 416. But, in general, parol evidence of intent is not admissible unless there is such doubt and ambiguity on the face of the papers as requires extrinsic evidence to explain them. Thorne v. Rooke, 2 Curt. 799. See Part VI, *post*, c. 3.

<sup>2</sup> Aubert's Appeal, 109 Penn. St. 447, 1 A. 336. A power of attorney does not revoke. 89 P. 985, 5 Cal. App. 161. Cf. Offut v. Divine, 21 Ky. L. R. 1500, 53 S. W. 816.

<sup>3</sup> 46; 4 Co. 60 b.; 2 T. R. 667, 695; 2 P. Wms. 624; Hodaden v. Lloyd, 2 Bro. C. C. 544; Long v. Aldred, 3 Add. 48; Warner v. Beach, 4 Gray, 162; Carey, *Re*, 49 Vt. 236, 24 Am. Rep. 133.

husband the chief control if not the ownership;<sup>1</sup> yet, by the better opinion (though various States hold to the contrary), it operates to this very day, as a legal revocation, and justly so, despite the new privileges with which equity and modern legislation may have seen fit to clothe her.<sup>2</sup> In truth, modern experience so justifies the doctrine that marriage shall operate as a revocation, if, at all events, no antenuptial arrangement, no provision in view of the marriage has entered into such a will, that, instead of exempting the wife, legislation now inclines to extend the rule to the husband, by way of equalizing the privileges of the sexes.<sup>3</sup> A man's will by the older policy of our law, was not revoked by his subsequent marriage at all;<sup>4</sup> but late statutes in England and several American States give marriage that absolute effect as to man or woman.<sup>5</sup>

<sup>1</sup> Schoul. Hus. and Wife, §§ 86-89.

<sup>2</sup> Brown v. Clark, 77 N. Y. 369; 138 Mass. 45, 52 Am. Rep. 255; Blodgett v. Moore, 141 Mass. 75, 5 N. E. 470; 142 Mass. 242, 7 N. E. 720; 66 P. 710, 40 Ore. 154; Vanderveer v. Higgins, 80 N. W. 1043, 59 Neb. 333; Hudnall v. Ham, 56 N. E. 172, 183 Ill. 486, 75 Am. St. Rep. 124, 48 L. R. A. 557.

But in Rhode Island the marriage of a *feme sole testatrix* was treated as operating only a presumptive revocation of her will. Miller v. Phillips, 9 R. I. 141. And in certain States a woman's marriage has been held not to revoke her previous will. Webb v. Jones, 36 N. J. Eq. 163; Tuller, Re, 79 Ill. 99, 22 Am. Rep. 164. See also Noyes v. Southworth, 55 Mich. 173, 20 N. W. 891, 54 Am. Rep. 359; Fellows v. Allen, 60 N. H. 439, 49 Am. Rep. 328; 70 Wis. 251, 5 Am. St. Rep. 174, 35 N. W. 731; 63 N. H. 475, 56 Am. Rep. 530, 3 A. 604; Hunt's Will, 81 Me. 275, 17 A. 68; Roane v. Hollingshead, 76 Md. 369, 35 Am. St. Rep. 438, 17 L. R. A. 592, 25 A. 307; Lyon's Will, 96 Wis. 339, 340, 65 Am. St. Rep. 52, 71 N. W. 362, and cases cited; 70 Wis. 251, 5 Am. St. Rep. 174, 35 N. W. 731; 86 Ga. 368, 11 L. R. A. 51, 12 S. E. 652. In Carey, Re, 49 Vt. 236, 24 Am. Rep. 133, it is held that a woman's will of personalty is revoked by her subsequent marriage, while her devise of real estate is not, under the Vermont statutes. Where our courts, under the influence of the later marital legislation, treat the wife's will as not *per se* revoked by her marriage, their main object seems to be to put wife and husband upon an equal plane in this respect. But that effect would be accomplished by causing marriage to operate a revocation correspondingly of the husband's will. In various States, however, the common law rule is held with questionable liberality, to have been so changed by the statutory removal of the wife's disabilities with respect to the disposition of her property that a woman's marriage works no revocation of her will. As to the imperfect statute expression, that the will of an "unmarried" woman shall be deemed revoked by her subsequent marriage, see 131 N. Y. 620, 15 L. R. A. 292; 153 N. Y. 416, 60 Am. St. Rep. 664; Smith v. Clemson, 6 Houst. 171; Hibberd v. Trask, 67 N. E. 179, 160 Ind. 498. See 100 N. Y. S. 1100 (even though will provides for intended spouse).

<sup>3</sup> Even if there be an antenuptial assent by one spouse to the other's will, this ought not of itself to debar the rights of offspring born subsequently of the marriage. Craft's Estate, 164 Penn. St. 520, 30 A. 493. And see Francis v. Marsh, 46 S. E. 573, 54 W. Va. 545.

<sup>4</sup> See next section.

<sup>5</sup> 1 Vict. c. 26, § 18; 15 P. D. 111, 152; Stimson's Am. Stat. Law, § 2676. See 55 Conn. 171 (act not retrospective); 170 Mass. 401, 403, 40 L. R. A. 191, 49 N. E. 623 (marriage after the statute); 18 S. D. 335, 100 N. W. 738; 46 S. E. 573. Either spouse may or may not, under such a policy, prove disabled from making a new will at pleasure; but at all events the will made before marriage fails, as ought every disposition in legal and moral derogation of new conjugal rights which was not founded

425. **Unequally as the old common law treated husband and wife** in respect to their wills, a rule, borrowed from the civilians, has for at least two centuries reduced the difference of their condition; namely, that if the husband not only married but had a child born to him after making his will, a revocation should be implied.<sup>1</sup> And the same rule was afterwards extended to marriage and the birth of a posthumous child.<sup>2</sup> Modern legislation robs this topic of its former prominence in the law of testamentary revocation.<sup>3</sup>

426. **But as to marriage and birth of a child,** the rule of implied revocation does not operate where the will itself has provided for the future wife and child;<sup>4</sup> nor, as it appears, unless the entire estate is thereby disposed of to their utter exclusion and prejudice;<sup>5</sup>

in a full, fair and open treaty and antenuptial settlement between the parties contemplating a marriage. Schoul. Hus. and Wife, § 348; 87 Cal. 643.

<sup>1</sup> This rule is of modern origin, so far as English law is concerned. It is found in Inst. l. 2, tit. 13. The first reported decision in English courts is *Overbury v. Overbury* (1682), 2 Show. 242; *Emerson v. Boville*, 1 Phillim. 342, and citations. It was subsequently adopted in the common-law courts (1771) in *Christopher v. Christopher*, 4 Burr. 2171, 2181, note. See 1 Wms. Exrs. 193. The American decisions under this head are numerous. See 4 Johns. Ch. 506; *Warner v. Beach*, 4 Gray, 163; 1 Desaus. 543; 1 Ash. 224; 4 Kent Com. 527.

<sup>2</sup> 1 Wms. Exrs. 193; 1 Jarm. Wills, 123; *Doe v. Lancashire*, 5 T. R. 49; *Hart v. Hart*, 70 Ga. 764; 11 Phila. 110. In applying such a rule, the ecclesiastical courts long regarded the case as one of presumption merely; but the common law tribunals, impressed more deeply by the justice of such a policy and the analogy of the wife's condition, solemnly decided that the principle was one of legal inference, independently altogether of what the party himself might have intended. *Marston v. Fox*, 8 Ad. & E. 14. See 1 Wms. Exrs. 196; 2 Moore P. C. 51; 1 Phillim. 473.

<sup>3</sup> *Supra*, 424. But the legislative change must be an explicit one in order to take effect. See *Hulett's Estate*, 66 Minn. 327, 69 N. W. 31; 101 N. W. 144, 125 Iowa, 424. As numerous States still adhere to the conjugal distinction we may briefly observe one or two salient points of this doctrine. Marriage alone, or the birth of a child alone, did not operate to revoke the testator's will; both conditions must have succeeded his act of disposition; and hence the birth of his posthumous child was held by the common law courts not to repeal a will made by the husband during marriage. 4 Burr. 2171; *Doe v. Barford*, 4 M. & Sel. 10; 4 Kent Com. 523, and cases cited; 3 Call. 357. Here, however, the ecclesiastical rule of regarding one's intention had its advantage; for other circumstances might afford a handle for inferring that a revocation was really meant; nor did such courts positively assert that a marriage subsequent to the will was in every case indispensable. 1 Wms. Exrs. 197, 198; *Johnston v. Johnston*, 1 Phillim. 447. Whether the order of events, marriage and birth, is here of material consequence the cases do not clearly decide. See 1 Jarm. Wills, 124; 4 Ves. 848. But at all events the rule of revocation would apply all the same, whether the testator who married was a widower when he executed the will in question, with children by a former wife for whom the will had provided, or an unmarried man, so far as his personal estate was concerned. *Havens v. Van Den Burgh*, 1 Denio, 27. 1 Ves. & B. 390. And we should remember that revocation of a will, under any such circumstances, could work no greater hardship than to bring about a descent and distribution of the estate under the just and politic rules which the law prescribed for intestacy.

<sup>4</sup> *Kenebel v. Scrafton*, 2 East, 530.

<sup>5</sup> 2 East, 541; *Dougl.* 40; 8 Ad. & El. 570. And see 4 Kent Com. 621; *Havens v. Van Den Burgh*, 1 Denio, 27; *Jackson v. Jackson*, 2 Penn. St. 212.

neglect of a moral obligation being the point of inquiry, rather than what the testator had intended.<sup>1</sup> In this country the rule of judicial construction is greatly affected by local statutes on this subject.<sup>2</sup>

426a. **Where there is a complete divorce of married parties, and their reciprocal property rights are fixed, they become strangers to each other and neither owes the other any further duty.** The natural presumption arising from these changed relations would therefore seem to imply in law the revocation of the existing will of either spouse in favor of the other.<sup>3</sup>

427. **Other cases of revocation implied by law are stated in the books; not, however, without a vague extension of the word**

<sup>1</sup> But, as we have seen, the English courts did not harmonize upon the underlying principle. *Supra*, 425.

<sup>2</sup> Some States, as we have seen, make the will of man or woman absolutely revoked (as now in England) by his or her marriage; in others the older rule of law still prevails that no revocation of a man's will occurs without subsequent marriage and birth of a child. *Supra*, 424. Whether revocation should operate, however, in this latter case as a legal presumption or as a mere presumption of fact open to rebutting proof is not positively and uniformly settled; but the local enactment guides frequently the favored conclusion. See the various later statutes, with their local peculiarities; 4 Kent Com. 526, 527; 31 Fla. 139; 47 Penn. St. 144; 42 Ind. 365; 46 Iowa, 487, 26 Am. Rep. 157; 60 Tex. 230; 42 S. E. 214, 115 Ga. 857; 88 N. W. 739, 85 Minn. 247, 89 Am. St. Rep. 545, 56 L. R. A. 754; 87 N. W. 853, 111 Wis. 605; 56 L. R. A. 258. As to adopted child, cf. 124 Ind. 41, 7 L. R. A. 485, 23 N. E. 860; 111 Wis. 605, 56 L. R. A. 258, 87 N. W. 853; 80 N. W. 332, 109 Iowa, 159, 77 Am. St. Rep. 524, 46 L. R. A. 171.

Statute expressions vary so greatly and are so liable to change that no uniform American doctrine can be asserted on this subject. Children born after the making of a will, posthumous or otherwise, are found the subject of still broader enactments; but, on the whole, the policy of such statutes is only to revoke the will so far as to let them in, when otherwise unprovided for, to the share which would have fallen to them in case the father had died intestate. This provision is an absolute one, as such statutes are commonly worded, and the revocation is *pro tanto*, at least, regardless of what the testator may have intended. *Waterman v. Hawkins*, 63 Me. 156; *Knotts v. Stearns*, 91 U. S. 638, 23 L. Ed. 252; *supra*, 20. But if the will discloses, without the aid of extrinsic evidence, an intention not to provide, some of these acts appear to avoid a legal revocation. See 43 N. J. Eq. 407, 5 A. 722; 46 Ohio St. 234, 15 Am. St. Rep. 584, 20 N. E. 461; 120 Ill. 111. Many American codes go still further and supply the same relief presumably to all children and their legal representatives for whom the paternal will makes no provision and who have had no advancement during the parent's life. *Supra*, 20. As to an adopted child, see 89 N. C. 441; 124 Ind. 41, 7 L. R. A. 485, 23 N. E. 860. See 97 Mass. 439; 106 Mass. 320; 6 Wall. 337, 18 L. Ed. 802; 65 Md. 357, 4 A. 410. Antenuptial ample provision may prevent the revocation. 84 Ala. 38, 4 So. 42; 121 Penn. St. 1. See 30 W. Va. 599, 5 S. E. 139; 58 A. 846, 209 Penn. 456, 68 L. R. A. 464. Where under local statute a subsequent marriage revokes the will, revocation is doubly fortified by the birth of offspring of that marriage. See 30 A. 493, 164 Penn. St. 520.

<sup>3</sup> Such is the rule sometimes asserted. 95 Mich. 16, 54 N. W. 699, 35 Am. St. Rep. 505; *Wirth v. Wirth*, 149 Mich. 687, 113 N. W. 306. Yet decisions point occasionally in the opposite direction, and something may fairly depend upon the actual character of the disposition and the cause of divorce. *Charlton v. Miller*, 27 Ohio St. 298, 22 Am. Rep. 307; *Baacke v. Baacke*, 50 Neb. 18, 23; *Jones's Estate*, 60 A. 915, 211 Penn. 364, 69 L. R. A. 940, 107 Am. St. Rep. 581.



"revocation" beyond that genuine repeal of a testamentary instrument to which it is more properly confined.<sup>1</sup> Revocation of a particular will by mere inference of law or presumption is limited to a very few instances in our modern practice; while, on the other hand, changes in the condition of the testator's affairs or through the mortal chances to which both he and his beneficiaries are exposed, may work out a very different settlement and distribution of his estate after his death from what the will purported to arrange.<sup>2</sup>

**427a. Revocation of a will is open to impeachment, in the usual manner, for mental incapacity, or because the exertion of undue influence, fraud, or force upon the testator induced the act.**<sup>3</sup> Even

<sup>1</sup> 1 Jarm. Wills, 147-149; where a chapter is devoted to "revocation by alteration of estate," with a considerable exposition of the old law on this subject. If a will devises nothing but a particular piece of land, and the testator afterward conveys away that land, a revocation of the devise may be implied; and so if a testament simply bequeaths specific chattels which are otherwise disposed of during one's life, there remains, at all events, nothing for his will to operate upon. *Epps v. Dean*, 28 Ga. 533; *Bowen v. Johnson*, 6 Ind. 110, 61 Am. Dec. 110. As to full conveyance, see *Collup v. Smith*, 89 Va. 258, 15 S. E. 584; 100 Wis. 192, 75 N. W. 971. And see 5 Sawyer C. C. 282; *Conn. Trust Co. v. Chase*, 55 A. 171, 75 Conn. 683; 82 Law T. N. S. 270; 125 Mich. 357, 84 N. W. 293; *Benson's Estate*, 58 A. 135, 209 Penn. 108; *Templeton v. Butler*, 94 N. W. 306, 117 Wis. 445 (revocable certificate). Even if the gift by the will is general and not specific, it necessarily fails if there be no such general property. This, however, would not be readily ascertainable until the estate was settled; and as preliminary to a settlement, the will, if there be one, ought to be admitted to probate. See *Morey v. Sohler*, 63 N. H. 507, 56 Am. Rep. 538, 3 A. 636. A particular bequest may be practically revoked by an act or contract inconsistent with it. 14 N. Y. Supr. 398. Though not by a simulated transfer of the property bequeathed. *Blakemore's Succession* (La.) 1891.

One's estate may over and over again change in value and specific character between the date of executing the will and his death. The proportions as between various beneficiaries may greatly change beyond what he had intended; he may part with this piece of property and acquire that; one object of his bounty may die and another may come into existence; he may even die so involved in debt or utterly bankrupt as in effect to annihilate the gifts which his own testament professes to bestow. See *supra*, 28, 29. All this, however, does not, at our day, revoke in any such sense as to set the instrument itself practically aside in whole or in part or disentitle it to probate. The testator's appointment of executor still takes effect; his scheme of disposition is not superseded in form; only it becomes a matter of practical administration, assisted by legal construction of the will, to determine how far and in what proportions his gifts may have failed, if they fail at all, under his unrevoked testament.

<sup>2</sup> Modern legislation repudiates in England and some of our States the whole theory of a presumed intention to revoke on the ground of an alteration in circumstances. Act 1 Vict. c. 26, § 19; *Stimson Am. Stat. Law*, § 2676. See *Clements v. Horn*, 44 N. J. Eq. 595, 18 A. 71; *Burnham v. Comfort*, 108 N. Y. 535, 2 Am. St. Rep. 462, 15 N. E. 710; 142 Mo. 244, 64 Am. St. Rep. 560. And what is left of that theory, aside from such statutes, it would be very difficult to say. See *Shaw, C. J.*, in *Warner v. Beach*, 4 Gray, 163; *Baacke v. Baacke*, 50 Neb. 15, 69 N. W. 303; *Hoitt v. Hoitt*, 63 N. Y. 475, 20 Am. Rep. 555; *Woodward v. Woodward*, 81 P. 322, 33 Col. 457; *Hospital Trust Co. v. Keith*, 57 A. 1060, 26 R. I. 42.

<sup>3</sup> Cf. 384, 387, 395, and cases cited with Part II, *supra*; *Ross v. Gleason*, 115 N. Y. 664, 22 N. E. 149; *Graham v. Burch*, 44 Minn. 33, 46 N. W. 148; 47 Minn. 171, 28 Am. St. Rep. 339, 49 N. W. 697; 86 N. W. 946, 127 Mich. 496.

fundamental error on the testator's part may be shown to have caused the revocation.<sup>1</sup> In short, whether revocation or alteration be by a new will or codicil or by some oral act of cancelling or destroying, mental capacity and freedom from constraint are requisite as in making the original will.<sup>2</sup>

<sup>1</sup> *Mendinhall's Appeal*, 124 Penn. St. 387, 10 Am. St. Rep. 590, 16 A. 881; *Campbell v. French*, 3 Ves. Jr. 321; *Evans v. Evans*, 10 Ad. & E. 228.

<sup>2</sup> See *Gardner v. Gardner*, 177 Penn. 218, 35 A. 558.

As to wills not revocable, because of a consideration, see Part V, *post*.

## CHAPTER II.

## ALTERATION OF WILLS.

428. "Alteration of a will" may be understood in either of two senses: (1), and more generally, that of changing one's own testamentary disposition, by whatever external acts this may be effected; (2), and more specifically, that of changing the face of the testament itself by an outward act which may or may not have been performed by the testator or under his sanction.<sup>1</sup>

429. As to the more specific alteration, which consists in changing externally the face of the original testament. It has been observed that one could partially erase, cancel or even obliterate, a written testament, under the older law, so as only to revoke the will in part, as, for instance, by annulling some particular bequest.<sup>2</sup> The material alteration of a deed or contract, by one party under it without consent of the other, avoids the instrument in an extreme case; otherwise it leaves the estate or interest acquired as before; and the altering party is not free to modify it by his altered intention.<sup>3</sup> But the maker of a will having no element of mutuality, but resting in the testator's discretion, may change it at pleasure, provided the formalities of execution which the statute imposes for the better safeguard of such instruments be properly observed.<sup>4</sup>

430. The general right of a testator to alter, independently of later enactments, in derogation of his informal exercise of discretion, has been noticed.<sup>5</sup>

431. But, as in total revocation, intention should accompany the act and be fairly inferable from the manner of the alteration, in

<sup>1</sup> But however we may use the word "alteration," we are not to consider it as involving the idea of a total revocation of the existing will, but only a revocation *pro tanto*, if a legal revocation at all. A later will is not substituted in place of the earlier one, but there is at most a variation in the former terms, and intent must be gathered from the original will and its amendments taken together.

<sup>2</sup> *Supra*, 397. And see as to totally revoking thus, 383-396.

<sup>3</sup> 11 Co. 27; 1 Greenl. Ev. § 566.

<sup>4</sup> Alterations and erasures made in a will before it is executed are, when made by the testator himself or under his authority, effective, provided the fact of prior erasure or alteration appear; for the true will is the instrument as actually executed, and probate should stand accordingly. See *Lurie v. Radnitzer*, 166 Ill. 609.

<sup>5</sup> See 391-397, *ante*, as to cancelling, erasing, obliterating, etc., in whole or in part, and full revocation or revocation *pro tanto* in consequence. Testator is permitted thus to tear away, cut, or draw his pen over some particular bequest, so as to revoke it. *Ib.*; 1 Jarm. Wills, 134.

order to revoke in part.<sup>1</sup> In all such cases the testator's obvious purpose is regarded; and if cancelling or mutilating or interlining was part of a transaction intended by him to operate an express change of disposition, or not for the purpose of simply striking out some part of the original will, the failure of this transaction to take full effect leaves the will as originally executed, so far at least as it remains known.<sup>2</sup> In short, alterations are considered as a whole; and where something is stricken out simply that something else may be substituted, the failure of the substitution through informality involves the failure of the striking out.<sup>3</sup>

432. All such informal alterations, however, are obnoxious to the policy of our later legislation, which prescribes for wills of personalty not less than realty a formal subscription and attestation. Under many American codes, as under the English statute,<sup>4</sup> it may now be assumed that alterations of disposition, whether expressed on the face of the original instrument or by new writings, and especially if the change is not simply a complete erasure or destruction, require a statute execution in presence of witnesses in order to operate.<sup>5</sup>

433. Where the alteration by obliteration or cancelling has rendered the original words of the will illegible, it may be asked whether the local statute permits of partial as well as total revocation, and whether or not the act in question amounts to a partial destruction of the will within its intendment.<sup>6</sup>

434. When a will is informally altered by the testator,<sup>7</sup> the legal effect is not to make the will void, but to establish it in probate

<sup>1</sup> See 5 Ind. 389; Dixon's Appeal, 55 Penn. St. 424; Hesterberg v. Clark, 166 Ill. 241, 57 Am. St. Rep. 135, 46 N. E. 734 (interlineation). And see as to incomplete purpose, Heise v. Heise, 31 Penn. St. 246; Stover v. Kendall, 1 Coldw. 557; Youse v. Forman, 5 Bush, 337.

<sup>2</sup> 4 East, 419; 62 Ill. 368; 7 Johns. 394; Stover v. Kendall, *supra*; Linnard's Appeal, 93 Penn. St. 313, 39 Am. Rep. 753.

<sup>3</sup> Penniman's Will, 20 Minn. 245, 18 Am. Rep. 368. As to merely cursory and deliberative alterations the legal effect is unaltered. 3 Phillim. 321; 1 Add. 409.

<sup>4</sup> 1 Vict. c. 26, § 21.

<sup>5</sup> *Supra*, 380, 397. Under the English act, testator and witnesses may sign in margin or opposite the alteration, etc., and even may write initials only. Blewitt, *Re*, 5 P. D. 116.

The statute attestation of an original will is not the attestation of the will as altered. 7 Johns. 399; Doane v. Hadlock, 42 Me. 72; Penniman's Will, 20 Minn. 245, 18 Am. Rep. 368; 37 W. Va. 38, 16 S. E. 489.

<sup>6</sup> See 397 *supra*; Greenwood's Goods, (1892) P. 7 (evidence to show what were the illegible words, etc.).

<sup>7</sup> As by interlining a new bequest without the statute attestation now locally required.

as it stood before the change was made.<sup>1</sup> But where interlineations and alterations are made in the original will so as to conform to the existing statute, or are otherwise legally made, the will with its interlineations and amendments should be admitted to probate.<sup>2</sup> If a will is altered after execution and then republished and confirmed by a codicil, it is enough to show that the alterations were made before the execution of the codicil.<sup>3</sup>

435. **Unattested and unexplained alterations upon the face of a will are presumed to have been made after and not before the execution of the instrument;** and such after some controversy is the rule now announced both in England and leading American States.<sup>4</sup> This presumption yields, however, to actual proof; and slight circumstances, including the sense or a testator's own declarations of intent before executing his will, may establish the contrary.<sup>5</sup>

436. **Now to speak of altering one's disposition in the general sense,** without confining ourselves to the physical change or mutilation of the original instrument. The natural expression of such alteration, and, in view of late legislation, by far the safer one, is by means of a codicil or codicils, duly executed like any other will;

<sup>1</sup> While our later legislation quite discourages partial revocation and informal changes in an executed will, alterations, erasures, and obliterations found in a will are treated according to circumstances. If they preceded the formal execution, they stand as the final expression of the testator's wishes; but if made afterwards, the alteration fails unless the will in its altered shape is duly attested, and probate is granted as of a valid will, according to its import as originally attested. Exrs., *post*, 84; 7 Pick. 61; 7 John. 394; 4 Redf. 178; *Gardiner v. Gardiner*, 65 N. H. 230, 8 L. R. A. 383, 19 A. 651; *Hesterberg v. Clark*, 166 Ill. 241, 46 N. E. 734.

<sup>2</sup> *Blewitt, Re*, 5 P. D. 116; *supra*, 248; *Penniman's Will*, 20 Minn. 245, 18 Am. Rep. 368.

<sup>3</sup> *Burge v. Hamilton*, 72 Ga. 568; *Tyler v. Merchant Tailors' Co.*, 15 P. D. 216. On the other hand, alterations made in a will by a stranger, after its due execution, and without the testator's knowledge or sanction, do not affect the validity of the testament in other respects. *Grubbs v. McDonald*, 91 Penn. St. 236; 1 Gall. 70; *Morrell v. Morrell*, 7 P. D. 68; *McIntire v. McIntire*, 162 U. S. 383, 40 L. Ed. 1009; *Diener's Estate*, 67 A. 726, 80 Vt. 259; 113 N. W. 149, 79 Neb. 569, 14 L. R. A. (N. S.) 259. And in such a case, or where erasures or alterations are informally made in a duly executed will, the probate should be according as the will was originally executed and witnessed. *Simrell's Estate*, 154 Penn. St. 604, 26 A. 599. As to deciding whether words obliterated in a will are "apparent," see *Finch v. Combe*, (1894) P. 191. See also (1899) P. 36.

<sup>4</sup> 4 Moore P. C. 419; 7 Moore P. C. 320; 16 Q. B. 747; 16 Q. B. 745; 1 Wms. Exrs. 130; 5 Redf. (N. Y.) 544; 2 Demarest, 160. But see *Williams v. Ashton*, 1 Johns. & H. 115, 118. (Wood, V. C.)

<sup>5</sup> See *Martin v. King*, 72 Ala. 354; *supra*, 401-403 (declarations, etc.); 16 Q. B. 747; 1 Johns. & H. 115. It is unquestionably proper that interlineations or alterations of any kind made before execution should be noted in the attestation of witnesses, and thus obviate all controversy. As to filling a will with blanks, see 1 Rob. 675; 7 Moore P. C. 320; 2 Rob. 192; *Hindmarch's Goods*, L. R. 1 P. & D. 307.

so that the original undefaced will, together with such addition or additions, shall stand in force as one's full last testament, after his death, like a statute with its later amendments.<sup>1</sup>

437. A codicil does not revoke a prior will except so far as necessary; unless, indeed, it contains an express clause of full revocation.<sup>2</sup>

438. In general, the different parts of a will, or of a will and codicil, should be reconciled if possible and receive upon comparison a fair and consistent interpretation.<sup>3</sup> But where there is a real discrepancy in the gifts between will and codicil, the codicil should prevail in preference.<sup>4</sup>

439. The general effect of one's later and inconsistent will upon his earlier one has already been discussed;<sup>5</sup> as also the inferences to be drawn where of two inconsistent wills the testator repeals the later without the earlier one.<sup>6</sup> The testator's intention is usually

<sup>1</sup> See "codicil" defined, *supra* 7, 8. Its usual effect is that of adding or amending merely, as a postscript or "little will."

<sup>2</sup> It usually "ratifies and confirms" the will expressly, except so far as it alters. See 409 *supra*. The decisions which turn upon this principle are very numerous and need not be stated at length; being quite prolix for the most part and involving the construction of language as variable as the details of mental intention itself. *Duffield v. Duffield*, 3 Bligh. N. S. 261; 4 M. & Sel. 1; 17 Sim. 86; *Tilden v. Tilden*, 13 Gray, 103, 108; *Wetmore v. Parker*, 52 N. Y. 450; *Lemage v. Goodban*, L. R. 1 P. & D. 57; 8 Cow. 56; *Johns Hopkins University v. Pinckney*, 55 Md. 365; *Bradley v. Gibbs*, 2 Jones Eq. 13; *Clarke v. Ransom*, 50 Cal. 595; *McGaully v. McGaully*, 39 So. 677 (Ala. 1905); *Williams v. Miles*, 94 N. W. 705, 68 Neb. 463; *Lane v. Hill*, 44 A. 393, 68 N. H. 275, 73 Am. St. Rep. 591; *Holden v. Blaney*, 119 Mass. 421; *Home v. Noble*, 172 U. S. 383, 43 L. Ed. 486.

Even though the codicil should profess to make a different disposition of the whole estate, the principle of the text is the natural and controlling one. And words and expressions contained in the codicil may by construction restrict its operation. See *Quincy v. Rogers*, 9 Cush. 291; 2 D. F. & J. 474 (specific gift and general gift); 1 Mer. 304. A clear gift in the will is not revoked by vague or doubtful expressions in the codicil. *Randfield v. Randfield*, 8 H. L. Cas. 225; *Joiner v. Joiner*, 2 Jones Eq. 68; 55 Md. 365; 3 Sim. 24; 4 De G. & J. 30; 190 Penn. St. 35, 42 A. 381; 39 So. 677; *Viele v. Keeler*, 129 N. Y. 190, 29 N. E. 78; *Home v. Noble*, 172 U. S. 383, 43 L. Ed. 486. Whether a codicil confirms an altered will as originally written or as altered is matter of construction. *Hay, Re*, (1904) 1 Ch. 317. And see *Griggs v. Griggs*, 70 N. E. 1099, 178 N. Y. S. 70. But all artificial rules should bend to the real intention of the testator, as gathered from the whole face of the paper, aided in doubtful cases by proof *aliunde*. A gift by codicil "instead of," or "in lieu of," what the will contains, means substitution, which may or may not be total according to circumstances. *March v. Marchant*, 6 M. & Gr. 813; 5 Jur. N. S. 12; K. & J. 168; 3 Mason, 456. And see 1 Jarm. Wills, 178; 14 Sim. 89; *Burgess v. Burgess*, 1 Coll. 367; 5 Jur. N. S. 687; *Brough, Re*, 38 Ch. D. 456. The disposition of the courts to generalize while construing the expression of particular wills must not, upon the whole, be taken with too implicit a confidence. See *post*, Part VI.

<sup>3</sup> Part VI, *post*; *Colt v. Colt*, 32 Conn. 422.

<sup>4</sup> See *Towry, Re*, 41 Ch. D. 64; *supra*, 406, 407; (1895) P. 186. As to provisions intended for substitution, or instead as additional in cumulative to the earlier gift, etc., see 423; 3 Phillim. 316. And see as to silently leaving executors as before, *Newcomb v. Webster*, 113 N. Y. 191, 21 N. E. 77.

<sup>5</sup> *Supra*, 417.

<sup>6</sup> *Supra*, 413.

followed, if it may be gathered from the face of the whole transaction and legislation does not impede.<sup>1</sup>

440. **The mere misrecital of a will by a codicil is inoperative,** and will not modify the dispositions of the original instrument; but this with other circumstances may operate to modify or alter.<sup>2</sup> In general the reference from the one instrument to the other may be useful for explaining the testator's full and final purpose.<sup>3</sup>

440a. **The general rule for proving codicils is the same** as for proving a will. Codicils usually receive probate with the will itself; but a codicil which refers to a previous will may be granted alone, where no trace of the will can be found;<sup>4</sup> and as to the general bearing of codicils upon one another or upon an original will, the testator's intention manifested in the several instruments should be given fair operation if possible.<sup>5</sup>

<sup>1</sup> *Utterson v. Utterson*, 3 V. & B. 122. Where the will has been destroyed by the testator, but the codicil is preserved which professed to be part of the will, the question arises whether the revocation of the will operates by inference to revoke the codicil also. The answer depends mainly upon the contents of the several papers and the intent to be fairly gathered from the face of the papers, aided, if need be, by extrinsic evidence. Evidence of actual intent may clear such controversies. (1) Dependent provisions. *Usticke v. Bawden*, 2 Add. 116; 4 Hagg. 369; *Bleckley's Goods*, 8 P. D. 179. (2) Independent provisions. 1 Curt. 289; *Greig, Re*, L. R. 1 P. & D. 72; *Gardiner v. Courthope*, 12 P. D. 14.

The usual and natural plan is of course to revoke by suitable act both will and codicil simultaneously, where such is the testator's real purpose, and thus leave nothing in the transaction to doubtful inference.

<sup>2</sup> *Margitson, Re*, 48 L. T. 172; (1892) P. 228.

<sup>3</sup> *Darley v. Martin*, 13 C. B. 683 (correction of ambiguity). See *Perkins v. Perkins*, 84 Va. 358, 10 Am. St. Rep. 863, 4 S. E. 833 (no reference at all); 28 Gratt 44. When a testator by a codicil confirms his will, the will together with all previous codicils is taken to be confirmed. See *Hopwood v. Hopwood*, 7 H. L. 728; *Biddulph v. Hole*, 15 Q. B. 848; 30 Neb. 149.

<sup>4</sup> *Clements's Goods*, (1892) P. 254.

<sup>5</sup> See one codicil intended as a substitute for another, (1895) P. 186. And see 448a.

## CHAPTER III.

## REPUBLICATION OF WILLS.

441. **By the republication of a will is signified that act done by a testator from which the law concludes that an instrument once revoked was intended by him to revive and operate as his last will. The act being sufficient in a legal sense his new intention is permitted to take effect accordingly.<sup>1</sup> A revoked will may be republished: (1) by its actual re-execution in effect, which constitutes an express republication of the will; (2) or by less formal acts from which republication may be implied, or as it is sometimes called, by constructive republication.**

442. **Express republication is the only kind recognized in England, at the present day, and doubtless to a considerable extent by the force of local legislation in the United States. There must be an actual re-execution of the original will; or, what is tantamount to this, the due execution of some codicil which shows an intention to revive the instrument.<sup>2</sup>**

443. **Legislation of this tenor excludes all other means of showing one's intention to revive his will. Destruction of the revoking instrument, as by burning, tearing or cutting, is not sufficient, nor do the rules of proof in revocation afford a criterion for proving republication.<sup>3</sup> With regard to the proper method of re-executing,**

<sup>1</sup> See Bouv. Dict. "Republication." To "revive" a will is used as synonymous with "republish." 1 Wms. Exrs. 205; Act. 1 Vict. c. 26, § 22.

<sup>2</sup> This statute rule for a long time affected only devises of real estate, wills of personalty being capable of implied and informal republication, as they were of informal execution in the first place. See *supra*, 252, 253. The Statute of Frauds required republication by re-execution before witnesses or by a duly executed codicil, in all devises of land (1677). More than a century and a half later the Act of Victoria (1837) applied a like requirement to all wills, whether of real or personal property. In the United States it has been held, by construction of local enactments, more or less positively worded, that the republication of a will is essentially at the present day the making of a new will with suitable intent, and the usual formalities of execution must be followed. Act 1 Vict. c. 26, § 22; *Barker v. Bell*, 46 Ala. 216; *Penniman's Will*, 20 Minn. 245, 18 Am. Rep. 368; 28 R. I. 523, 68 A. 622, 125 Am. St. Rep. 759, 14 L. R. A. (N. S.) 937; *Gable v. Daub*, 40 Penn. St. 217, 230.

<sup>3</sup> *Major v. Williams*, 3 Curt. 432. As to the former rule of constructively reviving an earlier existing will by destroying the later one, see 413-415. Intent must suitably appear; but no particular words are necessary to be used in a codicil in order to effect a republication of the will to which it is annexed. *Corr v. Porter*, 33 Gratt. 278; 447, *post*. And the execution of the codicil dispenses with re-execution of the will itself. *Brown v. Clark*, 77 N. Y. 369. To "confirm" in such a codicil means to "revive." App. Cas. (1891) 471.



where no codicil is used, the testator need not sign the will again; for if he acknowledges his signature before the required number of witnesses with the proper formalities this is good for either re-execution or an original execution.<sup>1</sup>

444. **As to implied republication, little footing** is found under our modern enactments. Possibly there are American codes which still leave the law of republication as it stood in England prior to 1838; and in English or American jurisdictions, moreover, wills of personal property made before the change of policy took effect, may still be offered for probate. However, the once honored theory of reviving a testament by informal acts is worthy of a professional student's curiosity.<sup>2</sup>

445. **But the implied intention to revive or republish must have consistently appeared** on all the proof; and where the face of the transaction imported an opposite conclusion, direct and unequivocal evidence of intent was required; mere declarations of the testator being treated as insufficient.<sup>3</sup> So that, after all, the chief decisions favorable to oral republication seem to have been rendered where the facts left it in doubt whether the will had ever been revoked, and theories of non-revocation or revival led to the same legal result, namely, the establishment of the will propounded for probate.<sup>4</sup>

<sup>1</sup> See *supra*, 321-325. Publication and republication call for essentially the same proof. 3 Wash. 481; 56 How. Pr. (N. Y.) 125; *Carey v. Baughn*, 36 Iowa, 540, 14 Am. Rep. 534. Generally speaking, it is a good republication for a testator to call witnesses of the statute number to such republication, declaring the paper to contain his last will, and then causing the witnesses to subscribe their names by way of attesting the transaction. *Dunn v. Dunn*, L. R. 1 P. & D. 277; *Brown v. Clark*, 77 N. Y. 369 (a peculiar statute); *supra*, 326; 76 N. Y. S. 373; 77 N. Y. S. 879.

As to republishing a conditional will which has failed, by re-execution, etc., see *supra*, 287, 288. And see, as to an intermediate will, *Campbell's Will*, 62 N. E. 1070, 170 N. Y. 84; *Hamilton's Estate*, 74 Penn. 69 (contingency).

<sup>2</sup> From 1677 to 1837 in England, and down to a period varying not greatly from the latter date in most parts of the United States, implied republication might operate upon wills of personalty, though excluded as to devises of land by the Statute of Frauds. A will of the former description, once revoked, needed no re-execution or solemn codicil to revive it; but republication might be effected by an unattested codicil or other writing, and even by the mere parol acts or declarations of a testator whose intention could be thus informally established. Such appears to have been the doctrine of our law from the earliest times, so far as wills of chattels or personal property were concerned; and even a devise of land, made under the old Statute of Wills, prior to the act of 29 Charles II, permitted of a parol revival in like manner. *Amb.* 494; *Cro. Eliz.* 493; 2 Vern. 209; 1 Wms. Exrs. 207. The prohibition of nuncupative wills did not involve a prohibition of nuncupative republication. See 2 Cas. temp. Lee, 494; Part III, c. 4, *supra*.

<sup>3</sup> E.g., two wills left. *Daniel v. Nockolds*, 3 Hagg. 777; 1 Phillim. 336; *Witter v. Mott*, 2 Conn. 67; *Jackson v. Potter*, 9 Johns. 312.

<sup>4</sup> Under all circumstances, the facts should have consisted with the intent of republishing, or at least of declaring the will to be in present force. And several decisions

446. **Oral revival where the will has been revoked by act of law** may here be noticed.<sup>1</sup> The will of a woman ceases to operate on her subsequent marriage; and although she should survive her husband the will remains inoperative without a republication.<sup>2</sup> The question then arises whether informal republication upon her widowhood gives new operation to the will, aside from legislative restriction.<sup>3</sup> An express revival of the will which has been legally revoked by subsequent marriage, or by marriage and the birth of a child, or by birth of a child alone (as legislation may require) is the desirable mode in these later times; and executing a codicil to that purport accomplishes usually the result as thoroughly as would the re-execution of the revoked will itself, provided the statute formalities be pursued.<sup>4</sup>

447. **By a duly attested codicil, suitably expressed,** republication takes place; and so far as unattested writings served formerly as wills on the strength of one's testamentary intent, unattested codicils or mere writings might revive as well as alter a will. Nor by the old law was it necessary to annex the codicil to the former will which it republished, nor to expressly republish the former will, provided the codicil appeared to intend republication in effect.<sup>5</sup>

announce the rule that a will once revoked by a written declaration cannot be republished by parol. 2 Conn. 67; 9 Johns. 312; *Carey v. Baughn*, 36 Iowa, 540, 14 Am. Rep. 534; *Love v. Johnston*, 12 Ired. 355. See *Marsh v. Marsh*, 3 Jones L. 77 (no real revocation). For cases of a defaced will never in fact revoked, though appearing so, see 3 Add. 264; 1 Wms. Exrs. 211.

<sup>1</sup> *Supra*, 424.

<sup>2</sup> 1 Cas. temp. Lee, 513; *Long v. Aldred*, 3 Add. 48; 12 W. R. 18. See *Carey, Re*, 49 Vt. 226 (surviving husband's assent to probate insufficient).

<sup>3</sup> The better opinion is that it does not. 49 Vt. 226. Cf. English ecclesiastical court opinion, 2 Hagg. 209. Nor is a will, revoked by inference of law on the subsequent birth of a child, or on subsequent marriage, to be considered as republished on merely parol proof, where the local statute requires all wills to be formally subscribed and attested, or where publication is an act subjected by local law to written solemnities, *Carey v. Baughn*, 36 Iowa, 540, 14 Am. Rep. 534; *Fransen's Will*, 26 Penn. St. 202; 53 S. E. 850.

<sup>4</sup> 1 Doug. 31; *Francis v. Marsh*, 46 S. E. 573, 54 W. Va. 545; *Brown v. Clark*, 77 N. Y. 349. See as to lost codicil, made after the marriage ceremony, *James v. Shrimpton*, 1 P. D. 431.

<sup>5</sup> 1 Wms. Exrs. 211, 212; 3 Bro. P. C. 107. But attaching the codicil to a will indicated intent more clearly. And see 1 Add. 38 (even where the reference to the will was vague or inaccurate). Every codicil was held constructively a part of a testator's will, and as such proved that the testator, when he made it, considered his will as then in existence. 3 Bro. P. C. 107; 1 Ves. Jr. 486; 4 Bro. C. C. 2; *Duffield v. Elwes*, 3 B. & C. 705; 11 C. B. N. S. 341; *Burton v. Newbery*, L. R. 1 Ch. D. 234; *Brown v. Clark*, 77 N. Y. 369; *Haven v. Foster*, 14 Pick. 543; *Corr v. Porter*, 33 Gratt. 278; *Stover v. Kendall*, 1 Cold. 557; 48 Penn. St. 501. See *Walton's Estate*, 45 A. 426, 194 Penn. 528 (reviving a prior codicil imperfectly attested). This somewhat strained rule of constructive intent, though liable to extend the inference of republishing be-

448. A codicil may attach to some former invalid testament still extant by suitable and clear expressions, so as to confirm and republish, and give valid operation to the whole as one's will.<sup>1</sup>

448a. When a codicil is written on the same paper as the will, or as a separate writing clearly and unmistakably refers to the will so as to preclude all doubt of its identity, proof of the codicil establishes the will without further proof. In such case, the codicil, when duly executed, operates as a republication of the original will, and gives to it the same force as if it had been executed at the date of the codicil, the two instruments being thus regarded as one, and as speaking from the date of the codicil.<sup>2</sup>

449. Formerly the efficacy of a codicil in republishing a prior will was especially valued, inasmuch as it might enlarge the operation of the original testament by disposing of after-acquired property.<sup>3</sup> Since the passage of statutes, English and American, which

yield one's particular intent, yet kept that intent in view for ultimate guidance. And where it appeared by the terms of the codicil that it was not intended to operate so as to republish, the usual presumption failed, and no republication took place. 2 B & P. 500; *Haven v. Foster*, 14 Pick 541; 1 Wms. Exrs. 213.

Where a codicil is made as part of one's last will, it will be presumed to refer to the will in existence and in force, and not to one already cancelled and revoked, though both exist undestroyed. *Crosbie v. Macdoulal*, 4 Ves. 615; 2 Rob. 326. And a codicil which refers to a will of a particular date, and not to a subsequent codicil, does not operate to republish that subsequent codicil. *Burton v. Newbery*, L. R. 1 Ch. D. 234. Nor does a codicil republish any part of the will inconsistent with its own terms. 26 Barb. 68. A mere casual reference in a codicil to a former revoked will does not revive it. *Dennis's Goods*, (1891) P. 326. And see *Smith, Re*, 45 Ch. D. 632; L. R. 1 P. & D. 575. See *McLeod v. McNab*, App. Cas. (1891) 471 (partial revocation by an intermediate codicil overcome). And see *Chilcott's Goods*, (1897) P. 223; 6 P. D. 205 (mistake of testator defeats).

<sup>1</sup> As where the former instrument was imperfectly executed. 96 N. Y. S. 506; 3 B. Mon. 390, 39 Am. Dec. 469; *Harvy v. Chouteau*, 14 Mo. 587, 55 Am. Dec. 120; *McCurdy v. Neall*, 42 N. J. Eq. 333, 7 A. 566; *Murfield's Will*, 74 Iowa, 479, 38 N. W. 170; 15 P. D. 216. Though a holographic codicil which is unattested cannot bring into operation a former invalid will. 83 Ky. 584. See 255; 89 S. W. 687, 121 Ky. 588. Or where it was made while the testator was coerced and the coercion is afterwards removed. *O'Neill v. Farr*, 1 Rich. 80. Or in the case of a married woman, disabled through coverture from disposing by her will at the time she made it. 3 Add. 243. So, too, where an infant made a will before he was competent to do so, he might expressly approve the will after arriving at competent age. *Supra*, 39-44. And persons of unsound mind might republish, when fully restored to reason, by an express act. *Swinb.* pt. 2, § 3, pl. 2; 1 Wms. Exrs. 225. That the most sensible course usually, for these days, is to destroy the inoperative instrument, and make a will *de novo* embodying whatever is desirable in the former invalid instrument, we need hardly argue.

<sup>2</sup> *Hubbard v. Hubbard*, 64 N. E. 1038, 198 Ill. 621; 154 Ill. 610, 613, 45 Am. St. Rep. 151, 39 N. E. 581; *Pope v. Pope*, 95 Ga. 87, 22 S. E. 245 (testator presumed to know former contents).

<sup>3</sup> As already observed, a devise, by the technical theory of our earlier law, carried no lands acquired after its date; while republication or a new devise alike required a testamentary writing duly attested, in order to affect one's real estate. See *supra*, 29, 442. By virtue of a codicil properly subscribed and witnessed, lands acquired after the date of the will and before the execution of the codicil would pass under the will.

dispense with continuous seisin and permit an original will to operate upon after-acquired lands wherever the testator so intended, this doctrine of revival by codicil has lost its prestige.<sup>1</sup> As for wills of personal property, they rarely needed this borrowed virtue to enlarge their operation, since a residuary bequest carried by its own terms whatever chattels the testator might own at his death.<sup>2</sup>

450. **The general effect of republication is to make a new will at the date of republication; to bring the old will down to the new date and make it speak from that subsequent time.**<sup>3</sup> Hence to re-execute, or else to execute a new will, destroying the former one, best avoids difficulties of interpretation to which papers of different date may unexpectedly give rise.<sup>4</sup>

This general doctrine of constructive republication under the old law is traced out in 1 Jarm. Wills, 193-204. And see 3 Pick. 213; 3 Mason. 486; 4 Desaus. 346; 16 N. Y. 9; 33 Gratt. 278. The testator's intent was often strained, though not tortured, to produce such a desired result.

<sup>1</sup> *Supra*, 29.

<sup>2</sup> 1 Jarm. Wills, 193; 2 Hagg. 209; 1 Wms. Exrs. 220; *supra*, 29. A will is now presumed to speak from the death of the testator, as to the real and personal property comprised in it.

<sup>3</sup> 1 Wms. Exrs. 216; Whiting's Appeal, 67 Conn. 379, 35 A. 268; Gilmor's Estate, 154 Penn. 523, 35 Am. St. Rep. 855, 26 A. 614. See Jenkins, *Re*, W. N. (1886) 177.

<sup>4</sup> Inasmuch as the last will among various ones is the testator's true testament, republication revokes as of its date every former will totally inconsistent with that which is republished. 1 Add. 38; Walpole v. Cholmondeley, 7 T. R. 138. But if the will which is republished had codicils added to it, the presumption arises that the testator means to ratify and confirm the will as amended by its codicils, and not otherwise; though the true intent of the transaction should control if discoverable. 4 Ves. 610; Uphill v. Marshall, 3 Curt. 636; Wikoff's Appeal, 15 Penn. St. 281, 53 Am. Dec. 597. See 1 Vict. c. 26, § 22; Hay, *Re*, (1904) 1 Ch. 317. The republishing codicil affirms mental capacity, etc., when the will itself was executed. Journey's Will, 57 N. E. 1113, 162 N. Y. 611. Republication does not have the effect of reviving legacies which have been adeemed or satisfied. Langdon v. Astor, 16 N. Y. 9; Paine v. Parsons, 14 Pick. 318; Tanton v. Keller, 167 Ill. 129, 47 N. E. 376. Nor in general to effect, by technical construction, a disposition different from what the testator had meant. See Linnard's Appeal, 93 Penn. St. 313, 39 Am. Rep. 753. A will altered after execution may be republished, together with those alterations, by a codicil annexed and clearly referring to it. 72 Ga. 568; 15 P. D. 216. A codicil which republishes as of its own date may ratify and confirm a will in whole or in part Hawke v. Euyart, 30 Neb. 149, 27 Am. St. Rep. 321, 46 N. W. 422.

## • PART V.

## WILLS UPON VALUABLE CONSIDERATION.

## CHAPTER I.

## JOINT AND MUTUAL WILLS.

451. The revocable or ambulatory quality of a will during the testator's lifetime is its cardinal feature. One may make, alter or revoke his own testament at pleasure, generally speaking, so long as he is an existing, capable person; and courts have for centuries asserted this as an axiom, without occasion to note whether the rule had not after all some qualifications.<sup>1</sup> But there are qualifications of this rule notwithstanding; and we apprehend that this revocable quality of a will springs from the deeper postulate that a disposition of property by testament is of the nature of a gift.<sup>2</sup>

452. But a will may be made upon valuable consideration in special instances; and if so, the disposition is no longer in the nature of a gift and gratuitous, but imperative.<sup>3</sup> As a matter of legal principle, then, we must admit that there may be in practical effect wills revocable and wills irrevocable; that all testamentary bequests are not absolutely and completely in the nature of a gift by the disposer; that a testator's intention must bend to imperious circumstances which interfere with his free, ambulatory disposition, and mould, partially or it may be wholly, the settlement of the estate which he leaves at his death.

452a. But a will is admissible to probate notwithstanding it indicates some contract obligation of binding force on the testator's part. For, at all events, one may by his will appoint the executor

<sup>1</sup> *Supra*, 274.

<sup>2</sup> In the vast majority of cases, indeed almost invariably, the disposition is in a genuine sense gratuitous; the owner regulates the succession to the bulk of his fortune as it may exist at his death, after discharging his debts and obligations. It may fairly be presumed that any devise or legacy under a will is given as a mere bounty, in the legal sense, and gratuitously. But one's testament operates subject to what his estate may owe, and should his estate prove embarrassed or insolvent the will, though good as an instrument, fails to dispose by its strict tenor. In short, the transfer of an estate by gift is obstructed by all claims for legal consideration against that estate.

<sup>3</sup> This may apply to certain bequests, instead of to the whole will; and no one can dispose of his estate so as to give it away regardless of the legal claims of his creditors.

to administer the estate; and, more than this, the probate of a will as to one's property merely concludes that the will is valid to pass any estate which the testator had power to devise or bequeath, and not that there was power to devise or bequeath just as the will seeks to direct.<sup>1</sup>

453. **Where one renders valuable services on the promise of a legacy** this rule of valuable consideration is practically applied. One who boards, nurses, cares for, an aged or feeble person, does so, in many instances, on the promise or expectation of a legacy, or it may be, the whole surplus of the estate. Mere expectation cannot in general create an enforceable contract; but a mutual understanding may, if shown, afford the basis of a valid claim against the indebted person's estate. If the person rendering such a service was promised the legacy by the person he served, and the claim has legal merits and was more than the mere performance of some natural duty to another, the courts afford a practical means of its enforcement.<sup>2</sup>

<sup>1</sup> Controversies of this sort are to be settled by proper and separate proceedings in law or equity. *Sumner v. Crane*, 155 Mass. 483, 15 L. R. A. 447, 29 N. E. 1151; 4 Met. 492; *Craine v. Edwards*, 92 Ky. 109, 17 S. W. 211; *supra* 249; 150 Mich. 630, 114 N. W. 408 (probate courts cannot enforce).

<sup>2</sup> For if such decedent makes no will, or makes a different will from what was agreed upon, or revokes a bequest which was founded upon his own promise, the claim may be presented for settlement, to the whole or partial absorption of the estate, as the case may be. Probate or common law tribunals cannot set aside or ignore the will as an instrument, nor make a will where one has died intestate, nor remodel or reconstruct a will to meet the special compact of the parties; but the person disappointed of his legacy is treated as a creditor of the estate. See *Shakespeare v. Markham*, 17 N. Y. Supr. 311; *Townsend v. Vanderwerker*, 160 U. S. 171, 40 L. Ed. 383; *Wellington v. Apthorp*, 145 Mass. 69, 13 N. E. 10; *Whetstone v. Wilson*, 104 N. C. 385, 10 S. E. 471; *Stone v. Todd*, 49 N. J. L. 274, 8 A. 300; *Hudson v. Hudson*, 87 Ga. 678, 27 Am. St. Rep. 270, 13 S. E. 583; *Laird v. Vila*, 100 N. W. 656, 93 Minn. 45; *Banks v. Howard*, 43 S. E. 438, 117 Ga. 94. But where the amount and mode of compensation had been left to the decedent, and some provision was made accordingly by his will or otherwise, for the person rendering the service, the latter must remain bound by it. *Lee's Appeal*, 53 Conn. 363, 2 A. 758. And by electing to receive the benefits under the will, such claimant waives his rights under the contract. *Towle v. Towle*, 79 Wis. 596, 48 N. W. 800. Cf. *Howe v. Watson*, 60 N. E. 415, 179 Mass. 30. As to objection of the Statute of Frauds to such oral contracts, see 145 Mass. 69, 13 N. E. 10; 109 Penn. St. 312, 1 A. 167. Any oral agreement of this kind should at all events be clearly and fairly proved. *McKeegan v. O'Neill*, 22 S. C. 454; *Maddison v. Alderson*, 8 App. Cas. 467; *Davis v. Hendricks*, 99 Mo. 478, 12 S. W. 887; 6 Dem. 473; 31 S. C. 605, 9 S. E. 802; 74 Wis. 176, 17 Am. St. Rep. 125, 4 L. R. A. 55, 42 N. W. 252; *Rice v. Hartman*, 84 Va. 251, 4 S. E. 621; 109 N. W. 983, 131 Wis. 216, 120 Am. St. Rep. 1038; *Smith v. Humphreys*, 65 A. 57, 104 Md. 285; 105 N. W. 499; 125 Iowa, 707; 93 N. Y. S. 864; *Russell v. Jones*, 135 F. 929; 80 P. 774; 38 Wash. 691; 93 N. Y. S. 864 (burden of proof). Obligation to remunerate as promised, not impaired, although consideration is to be wholly or in part in the future, and though the promisee remains under no binding mutual obligation on his part. 145 Mass. 69, 13 N. E. 10. See 114 Ind. 311, 15 N. E. 345 (written contract description). Gifts before death presumed a payment *pro tanto* and offsets regarded such as fair wages. *McNamara*

453a. There are other ways in which a will may be disregarded so far as it is inconsistent with a previous contract or covenant upon valuable consideration.<sup>1</sup>

454. Courts of equity have gone farther and specifically enforced, where one contracts upon valuable consideration to execute a will after a certain tenor; holding the agreement as binding upon his death against his representatives and estate.<sup>2</sup> But the evidence

*v. Michigan Trust Co.*, 148 Mich. 346, 111 N. W. 1066; 87 Ga. 678, 27 Am. St. Rep. 270, 13 S. E. 583; *Waters v. Cline*, 85 S. W. 209, 27 Ky. Law, 479, 586. No breach of promise or limitation until after the testator's death. *Lawson v. Mullinix*, 64 A. 938, 104 Md. 156; 98 N. Y. S. 934; 116 Tenn. 252, 6 L. R. A. (N. S.) 703, 92 S. W. 767; 117 Ga. 94, 43 S. E. 438. For unjustifiable discharge during testator's life, the person employed may sue at once to recover damages, including the prospective right to earn the legacy. *Edwards v. Slate*, 68 N. E. 342, 184 Mass. 317; 47 A. 626, 65 N. J. L. 279. And see *Burdine v. Burdine*, 36 S. E. 992, 98 Va. 515, 81 Am. St. Rep. 741 (emancipated slave). *Koebl v. Haumesser*, 114 Ind. 311, 15 N. E. 345.

<sup>1</sup> See as to covenants by deed, bond, etc., *Taylor v. Mitchell*, 87 Penn. St. 518, 39 Am. Rep. 383; *Major's Appeal*, 126 Penn. St. 109, 17 A. 535; 124 N. Y. 433, 26 N. E. 1024; 46 Minn. 33, 48 N. W. 450; 111 Mich. 140, 69 N. W. 239. An ante-nuptial contract may hinder the free testamentary disposition of a contracting spouse. *Cole v. Society*, 64 N. H. 445, 14 A. 73. And a business contract involving a bequest may find enforcement. *Croft v. Layton*, 68 Conn. 91, 35 A. 783. And see *Lipe v. Houck*, 38 S. E. 297, 128 N. C. 115 (abandonment of lawsuit); *Keagle v. Bessell*, 91 Mich. 618, 52 N. W. 58 (will and contemporaneous mortgage); 122 Ill. App. 26 (money expended, etc.); *Clawson v. Brewer*, 58 A. 598 (N. J. 1904); 78 S. W. 486, 97 Tex. 296; 98 N. W. 57, 70 Neb. 544, 113 Am. St. Rep. 802; *Spencer v. Spencer*, 55 A. 637, 25 R. I. 239 (a business service); 56 N. E. 237, 154 Ind. 253. Not revocable after other party has performed his part. *Teske v. Dittberner*, 98 N. W. 57, 70 Neb. 544. No application to property where testator had only a life estate. *Hill v. Gianelli*, 77 N. E. 458, 221 Ill. 286, 112 Am. St. Rep. 182. A bequest in trust does not comply with a contract to bequeath absolutely. 49 S. E. 49; 137 N. C. 91. See 42 S. E. 336, 131 N. C. 8. Statute of wills does not apply to such contracts. *Winne v. Winne*, 59 N. E. 832, 116 N. Y. 263, 5 L. R. A. 617.

<sup>2</sup> 3 Ves. 402; *Caton v. Caton*, L. R. 1 Ch. 137; s. c. L. R. 2 H. L. 127; *Gould v. Mansfield*, 103 Mass. 408; *Anding v. Davis*, 38 Miss. 574, 77 Am. Dec. 658; 11 Ired. 632; 1 Desaus. 116; 1 Bradf. 476; *Bolman v. Overall*, 80 Ala. 451, 60 Am. Rep. 107; *Carmichael v. Carmichael*, 72 Mich. 76, 16 Am. St. Rep. 528, 1 L. R. A. 596, 40 N. W. 173; 73 Mich. 483, 41 N. W. 514; *Schutt v. Missionary Society*, 41 N. J. Eq. 115 (entire estate carried over); *Allen v. Bromberg*, 41 So. 771, 147 Ala. 317; *Austen v. Kuehn*, 71 N. E. 841, 211 Ill. 13. For a trust is thus fastened upon the property of the promisor which binds the estate at his death. Nevertheless a devisee comes within the legal definition of one who takes by purchase; and hence to an oral contract of this character, the Statute of Frauds may often be pleaded. 3 Ves. 402; *Harder v. Harder*, 2 Sandf. Ch. 17. And see *Dicken v. McKinley*, 163 Ill. 318, 54 Am. St. Rep. 471, 45 N. E. 134; 132 Ill. 312, 23 N. E. 1018, 8 L. R. A. 414; *Gould v. Mansfield*, 103 Mass. 408, 4 Am. Rep. 573; *Ellis v. Cary*, 74 Wis. 176, 17 Am. St. Rep. 125. But part performance by the testator may sometimes appear. *Sharkey v. McDermott*, 91 Mo. 647, 60 Am. Rep. 270. Cf. *Ellis v. Cary*, 74 Wis. 176, 42 N. W. 252, 17 Am. St. Rep. 125, 4 L. R. A. 55; 163 Ill. 318, 54 Am. St. Rep. 471, 45 N. E. 134. Where the promise is to devise and bequeath all of one's real and personal property, it is indivisible; and failing as to the real property, it fails also as to the personal. *Ib.* See *Bird v. Pope*, 73 Mich. 483, 41 N. W. 514. But as to recovering the value of one's services rendered in consideration, see 453; *Stevens v. Lee*, 70 Tex. 279, 8 S. W. 40.

Probate proceedings, in the allowance of claims against an estate, must be distinguished from specific performance in equity. See 45 Hun, 401; 64 N. H. 445, 14 A. 73; 58 Hun, 610. Specific performance out of the estate may effect the subversion

to establish such an agreement, derogatory to a testator's usual right of disposition and revocation at pleasure, must be full and satisfactory; there should be clear consideration for the agreement; and hardship or injustice to innocent third persons may obstruct such a proceeding.<sup>1</sup>

455. Under the head of joint or mutual wills our courts often discuss this irrevocable quality of a will under those exceptional circumstances which import a valuable and reciprocal consideration. And it is here that courts of equity assume the difficult problem of enforcing a specific performance, so to speak, of the testamentary disposition, or rather of a testamentary compact, involving the making of the joint or mutual will in accordance with the mutual agreement of the parties.<sup>2</sup>

456. When these mutual or conjoint wills first came up in practice, the courts pronounced against them, as unknown to testamentary law.<sup>3</sup> But the later and better opinion, in both England and the United States, treats the conjoint or mutual will as capable of probate, provided it has been executed with all the statute

of a will. *Sharkey v. McDermott*, 91 Mo. 647, 60 Am. Rep. 270, 4 S. W. 107 (adopted child). See further *Belt v. Lazenby*, 56 S. E. 81, 126 Ga. 767 (specific performance as to specific property promised); 98 N. Y. S. 934 (*quantum meruit*, where after faithful service there had been a rupture); *Brandes v. Brandes*, 105 N. W. 499, 129 Iowa, 351; *Tussey v. Owen*, 52 S. E. 128, 139 N. C. 457 (a contract entire and indivisible to give "one-fourth" of estate); 105 N. W. 399, 125 Iowa, 707 (breach by the promisee); 66 P. 928, 40 Ore. 252; *Teske v. Dittberner*, 98 N. W. 57, 70 Neb. 544; 91 N. W. 181; *Howe v. Watson*, 60 N. E. 415, 179 Mass. 30; *Mueller v. Batcheler*, 109 N. W. 186, 131 Iowa, 650. A will may thus become practically irrevocable in specific cases. There is nothing unlawful in such a compact, nor contrary to good morals. *Day Ex parte*, 1 Bradf. 467. See *Snyder v. Snyder*, 77 Wis. 95, 45 N. W. 818; 128 Ind. 472, 25 Am. St. Rep. 456, 12 L. R. A. 120, 26 N. E. 890; 44 Ala. 454, 4 Am. Rep. 135; 4 Baxt. 357; 80 Ala. 451, 60 Am. Rep. 107 (an executed will delivered).

<sup>1</sup> 155 N. Y. 555, 50 N. E. 265; *Swann v. Housman*, 90 Va. 816; *Owens v. McNally*, 113 Cal. 444, 33 L. R. A. 369, 45 P. 710 (niece claiming promise of whole property, where the testator married afterwards); *Ide v. Brown*, 70 N. E. 101, 178 N. Y. 26 (insufficient consideration); 69 N. E. 118, 177 N. Y. 39.

<sup>2</sup> One promises to make a will of all his property in favor of a second person, who in consideration thereof agrees to make a similar will in favor of the first; the advantage thus to accrue being to such of the two as may happen to survive the other. Or the joint consideration may relate to a disposition in favor of third persons; though here courts are not so well disposed to enforce the cumbrous arrangement. In short, parties may agree between themselves to execute mutual and reciprocal wills; which, though remaining revocable in a sense, become, upon the death of one, fixed obligations, of which equity will assume the enforcement on an ultimate beneficiary's behalf (having no full remedy at law) if the survivor attempts to impair them. *Edson v. Parsons*, 155 N. Y. 555, 556, 50 N. E. 265.

<sup>3</sup> 1 Wms. Exrs. 10, 124; 1 Cowp. 268, *per* Lord Mansfield; *Hobson v. Blackburn*, 1 Add. 277; *Clayton v. Liverman*, 2 Dev. & Bat. 558; *Walker v. Walker*, 14 Ohio St. 157, 82 Am. Dec. 474.



formalities requisite for other wills, and has not been revoked by some later instrument.<sup>1</sup>

457. **But some of the cases which concede that such complex wills may pass to probate**, discuss the doctrine with reserve and attempt distinctions; shrinking evidently from sanctioning methods of disposition so unusual, beyond what the necessities of the case actually call for. Hence the law of mutual wills is still in a somewhat confused state, regarded as a doctrine of general jurisprudence.<sup>2</sup>

458. **If the property disposed of by a testament belongs to one only of the executing parties, the mere joinder of another in the execution does not make the instrument what the law terms a joint or mutual will, but the will of the party who owns the property.**<sup>3</sup>

458a. **The right to revoke a joint or mutual will exists** apparently as to either party, so that it cannot be set up in probate as his last instrument; but in equity, at all events, a subsequent revo-

<sup>1</sup> Joint dispositions of property, under a testamentary instrument, are, though irrevocable in equity as a compact, revocable as a will by either testator in the usual manner so far as relates to his own disposition. But, on the other hand, if either testator dies without revoking his disposition, the will may be admitted to probate as his last and separate will, on proof of due execution as in other cases, notwithstanding some one else executed and disposed of property by the same instrument or reciprocally. *Dea. & Sw. 6*; *2 Sw. & Tr. 453*; *L. R. 4 P. C. 236*; *Diez, Re, 50 N. Y. 88*; *Day, Ex parte, 1 Bradf. 467*; *Evans v. Smith, 28 Ga. 98, 73 Am. Dec. 751*; *Betts v. Harper, 39 Ohio St. 639, 48 Am. Rep. 477*; *Hill v. Harding, 92 Ky. 76*; *March v. Huyter, 50 Tex. 243*; *Schumacher v. Schmidt, 44 Ala. 454, 4 Am. Rep. 135*; *Piazzini Smith, Re, (1898) P. 7*. That the will happens to be made in conformity to some agreement, or imports on its face a mutuality of testamentary purpose, and a compact not to revoke without a joint assent, does not defeat its character as a will. See *Bradf. Surr. in Day, Ex parte, supra*. Reciprocal wills seem to be sanctioned by the civil law. *Ib.*; *Domat, pt. 2, lib. 3, tit. 1, § 8, art. 20*. See *Wood v. Roane, 35 La. Ann. 865*.

<sup>2</sup> Some cases appear to confine the rule to wills which are to operate exclusively upon survivorship. They refuse to extend the rule so as to admit to probate a will which treats the separate property of each owner as a joint fund and bequeaths or devises in favor of third parties. *26 Conn. 452, 68 Am. Dec. 404*; *State Bank v. Bliss, 67 Conn. 317, 35 A. 255*; *Evans v. Smith, 28 Ga. 98, 73 Am. Dec. 751*; *Walker v. Walker, 14 Ohio St. 157, 82 Am. Dec. 874*. And see opinion in *44 Ala. 454, 4 Am. Rep. 135*; *35 La. Ann. 865*. Joint will disregarded and fund distributed as intestate estate in *67 Conn. 317, 35 A. 255*. Such a distinction appears to lose sight of the vital element to such transactions, viz., a valuable and mutual consideration interposed; it rests rather upon the view that such complex wills are impolitic or abnormal and only admissible in law under a qualification. For a good example of joint will, see *28 Ga. 98, 73 Am. Dec. 751* (survivorship of two sisters). Predecease without revocation here settles the disposition. In *50 N. Y. 88*, husband and wife devised reciprocally to each other by such a will. And see (1898) P. 7.

<sup>3</sup> As to husband and wife, *Rogers, Appellant, 11 Me. 303*; *Allen v. Allen, 28 Kan. 18*. Cf. *8 B. Mon. 530*. And see *Wilson v. Gordon, 53 S. E. 79, 73 S. C. 155* (wills not joint, though with reciprocal provision); *Keith v. Miller, 174 Ill. 64, 51 N. E. 151*; *67 Penn. St. 341, 5 Am. Rep. 433*; *43 Tex. 543*.

cation which was not mutual cannot destroy the trust or compact created thereby.<sup>1</sup> An issue upon such a revoking will may raise the usual questions of validity.<sup>2</sup>

459. Where the joint or mutual disposition cannot take effect until both or all of the testators die, public policy receives a ruder shock. Some courts, however, stand by the consequences, and pronounce that probate must be delayed in such a case until both or all of the testators die.<sup>3</sup> But delicate and important questions in this connection remain unanswered; as, for instance, how the first decedent's estate shall meantime be settled and disposed of, and whether a title can in any sense devolve under his will; and the latest judicial disposition must be to find some way out of the dilemma.<sup>4</sup>

460. Where a joint will is expressed to take effect conditionally or upon a contingency; and the contingency does not happen, the joint will is inoperative even to revoke a previous will.<sup>5</sup>

<sup>1</sup> *Betts v. Harper*, 39 Ohio St. 157; *Davis's Will*, 120 N. C. 9, 58 Am. St. Rep. 771, 38 L. R. A. 289, 26 S. E. 636; 174 Ill. 64; *Peoria Humane Society v. McMurtrie*, 82 N. E. 319, 229 Ill. 519 (revocation by subsequent marriage). But cf. *Goldsticker's Will*, 84 N. E. 581, 108 N. Y. S. 489 (statute).

<sup>2</sup> 456; *Cawley's Estate*, 162 Penn. St. 520, 29 A. 701; 75 N. Y. S. 542.

<sup>3</sup> *Raine, Re*, 1 Sw. & Tr. 144. And see *Schumacher v. Schmidt*, 44 Ala. 454, 4 Am. Rep. 135; *Davis's Will*, 120 N. C. 9, 58 Am. St. Rep. 771, 38 L. R. A. 289, 26 S. E. 636.

<sup>4</sup> As to a partial probate in such cases, see 120 N. C. 9, 58 Am. St. Rep. 771, 38 L. R. A. 289, 26 S. E. 636; (1898) P. 7. And see 39 Ohio St. 639; 92 Ky. 76, 17 S. E. 199, 437; *Hershey v. Clark*, 35 Ark. 17, 37 Am. Rep. 1. See *Gerbrich v. Freitag*, 73 N. E. 338, 213 Ill. 552, 104 Am. St. Rep. 234 (no suspension until death of survivor).

<sup>5</sup> *Hugo's Goods*, 2 P. D. 73 (contingency of death at the same time). And see 285-293.

PART VI.  
CONSTRUCTION OF WILLS.

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CHAPTER I.

GENERAL RULES OF TESTAMENTARY CONSTRUCTION.

461. **The great and growing host of cases confronting us in the reports,** which involve the interpretation and effect of particular testaments and testamentary provisions, by no means betokens a concretion into well-ordered principles. It is rather a multitude of precedents without array; each serving its own capricious purpose except for some lesser rules of constraint. The law refuses to subject this class of instruments to rigid rules of construction, but makes what it may of a testator's language; our policy being to give the greatest possible scope to each dying disposer's wishes, provided he executed his will with due formalities. Indeed, without family dissension at all, resort is often had to the court to determine how the particular will shall be construed, so as to enable executors and trustees to perform their duties intelligently.<sup>1</sup>

462. **In wills, therefore, a testator's meaning is the great criterion,** so far as mere interpretation is concerned. What he intended the courts strain to discover.<sup>2</sup> Our rules of construction determine, then, the construction which courts are bound to put upon particular words, phrases, and forms of testamentary disposition, in question, in the absence of one's sufficiently declared intention to the contrary.<sup>3</sup> A testator cannot override rules founded in policy;

<sup>1</sup> A striking difference exists between deeds and wills (or devises) in respect of adherence to a precise phraseology. See Lord Kenyon (with expressions of regret) in *Denn v. Mellor*, 5 T. R. 558, 561.

<sup>2</sup> There are rules, those which restrain perpetuities, for instance, which must operate above and independently of any testator's intention, upon reasons of sound policy; but a mere rule of testamentary construction embodies a simple presumption, and no more: namely, that the testator intended one disposition rather than another or any other. Hence is it that a court may lay it down, in case of doubt, that the testator probably meant to dispose after a certain fashion, since otherwise he would have transgressed the rule against perpetuities, mortmain, or the like, and defeated his own intention.

<sup>3</sup> See Hawkins's Construction of Wills, preface. "A rule of construction always contains the saving clause, 'unless a contrary intention appear by the will'; though some rules are much stronger than others, and require a greater force of intention in the context to control them." *Ib.* And see 2 Jarm. Wills, 838; 78 N. Y. S. 245.

but any mere *prima facie* rule of construction may be overborne by the well-declared purpose of his will.<sup>1</sup> New kinds of property, moreover, have come into existence; new and complex modes of transfer and disposition attend the modern advance of society; and under any and all circumstances the language of wills may be presumed to express the sense of the testator according to his own age and surroundings, rather than any permanent or universal meaning.

463. **Judicial authority in the mere verbal interpretation of wills carries, therefore, no great weight, especially if the words and tenor of each whole will are not absolutely identical.**<sup>2</sup> The construction given to a verbal expression in one will is no positive criterion for all wills containing the same expression.<sup>3</sup>

464. **To lay down any positive and definite rules of universal application in the interpretation of wills, must continue to be, as it has been, a task, if not utterly hopeless, at least of extraordinary difficulty.**<sup>4</sup> "Of all legal instruments," it is well said, "wills are the most inartificial, the least to be governed in their construction by the settled use of technical legal terms, the will itself being often the production of persons not only ignorant of law but of the correct use of the language in which it is written."<sup>5</sup>

465. **A will is unaided by extrinsic evidence usually in construction, and the general rule of our law excludes parol evidence of what the testator actually intended, except in equivocal and ambiguous cases to be noted hereafter.**<sup>6</sup>

<sup>1</sup> It follows that in our modern practice, English and American, these rules of testamentary construction have but a limited and subordinate application.

<sup>2</sup> See 6 H. L. Cas. 108; 4 Ch. D. 68.

<sup>3</sup> *Smith v. Bell*, 6 Pet. 68, 8 L. Ed. 322, *per* Marshall, C. J. One of our most eminent judges, impressed with the inefficiency of the adjudged cases as guides in the construction of wills, has doubted whether any source of enlightenment on this subject is of much assistance other than the application of natural reason to the language of the instrument, under the light which may be thrown upon the intent of the testator by extrinsic circumstances surrounding its execution and connecting the parties and the property devised with the testator and with the instrument itself. Mr. Justice Miller, in *Clarke v. Boorman*, 18 Wall. 493, 14 L. Ed. 904. And see Taney, C. J., in *Bosley v. Bosley*, 14 How. 390, 397, 14 L. Ed. 468. Possibly a stricter adherence to precedent may be found in England than here, and yet great uncertainty is conceded there. 2 Jarm. Wills, 839. See the definite rules of presumption asserted in Stat. 1 Vict. c. 26.

<sup>4</sup> See Mr. Justice Story in *Sisson v. Seabury*, 1 Sumn. 235, 239 (1832). And see Lord Eldon in *Jesson v. Wright*, 2 Bligh, 50; *Seale-Hayne v. Jodrell*, 44 Ch. D. 590; *aff.* (1891) App. C. 304.

<sup>5</sup> *Clarke v. Boorman*, 18 Wall. 593, 14 L. Ed. 904.

<sup>6</sup> See c. 3, *post*. A will in modern times is a written instrument; and the interpreter of such an instrument must draw his conclusions from an accurate study of the document itself, unaided by external testimony. For what the instrument, once admitted to

466. The cardinal rule of testamentary construction is that the plain intent of the testator as evinced by the language of his will must prevail, if that intent may be carried into effect without violating some deeper principle of public policy. And whatever respect the construction put upon corresponding words in other wills may deserve from the court by way of precedent, this plain and lawful intent of the particular will should not be defeated.<sup>1</sup> But it is the intention of the testator as expressed in his own will which governs; and this intention must be discerned through the words of the will itself, as applied to the subject-matter and the surrounding circumstances.<sup>2</sup> Yet every will should be interpreted, as far as possible, from the standpoint apparently occupied by the testator; and attendant circumstances, such as the condition of his family and the amount and character of his property, may and ought to be taken into consideration as part of the *res gestæ*, where the language is not plain nor the meaning obvious.<sup>3</sup>

467. Where, therefore, the meaning of the language of the will is plain, the court of construction does not go outside to discover what the testator intended; but where the provisions are doubtful or may admit of more than one interpretation, the court will put itself in the situation of the testator, in reference to the property and the relative claims of the testator's family, the relations subsisting between him and them, and the circumstances which surrounded him, in order to be enlightened. And herein lies the distinction between the admission and the non-admission of extrinsic evidence to aid in interpreting a given will.<sup>4</sup>

probate, says plainly enough upon its own face is not to be disputed by evidence *aliunde*.

<sup>1</sup> Courts have spoken of such intention as the "law," the "pole star" or the "sovereign guide" when referring to this governing principle of testamentary causes, and the doctrine, in one formula or another, is constantly affirmed in the reports. Lord Hale in *King v. Melling*, 1 Vent. 231; *Wilmot, C. J.*, in 2 Burr. 1112, and 2 Wils. 322; *Summit v. Yount*, 109 Ind. 506; 31 Fed. 241.

<sup>2</sup> In other words, the plain and unambiguous words of the will must prevail and cannot be controlled or qualified by any conjectural or doubtful constructions growing out of the situation, circumstances or condition of the testator, his property or the natural objects of his bounty. 2 Jarm. Wills, 838; 6 Mass. 175, 4 Am. Dec. 107; *Christie v. Phyfe*, 19 N. Y. 344; 4 Jones Eq. 281; *Greenough v. Cass*, 64 N. H. 326, 10 A. 757; 216 Penn. 425; 81 N. E. 654, 196 Mass. 35; *Benner's Will*, 113 N. W. 663, 133 Wis. 325. For the true inquiry in interpreting the will is not what the testator meant to express, but what the words used in the will express. *Pack v. Shanklin*, 43 W. Va. 304, 27 S. E. 389.

<sup>3</sup> *Smith v. Bell*, 6 Pet. 68, 8 L. Ed. 322; *Blake v. Hawkins*, 8 Otto 315, 25 L. Ed. 139; *Brown v. Thorndike*, 15 Pick. 388; *Postlethwaite's Appeal*, 68 Penn. St. 477; 1 Sumn. 235; *Perry v. Hunter*, 2 R. I. 80; *Brown v. Bartlett*, 58 N. H. 511; 82 N. E. 267, 229 Ill. 507.

<sup>4</sup> See *post*, c. 3. The will of an illiterate or untrained person is leniently regarded in expression.

468. A testator's intention is, however, to be collected from the whole will taken together, and not from detached portions alone.<sup>1</sup> For, as it is figuratively said, the meaning must be gathered *ex visceribus testamenti*, or, to use another familiar expression, "from the four corners of the instrument."<sup>2</sup> Hence, too, in interpreting a will the testator's general and controlling purpose should be regarded, rather than any exalting and exciting ideas which may have dictated the terms of his will, or an exaggerated expression here and there.<sup>3</sup>

469. Language should be taken, so far as may be, according to the testator's own situation and surroundings; according to the time and place in which he lived, and the manners and institutions which moulded his character or to which on the whole he had the most probable reference, and the law of his personal environment. For the language of wills, as courts have observed, is not of universal interpretation, having the same precise import in all countries and under all circumstances.<sup>4</sup>

470. Technical words employed in a will are presumed to have been used in their settled legal meaning unless the contrary is manifest.<sup>5</sup> But technical words are liable to other explanatory

<sup>1</sup> Lane v. Vick, 3 How. 464, 11 L. Ed. 681; 12 Ga. 47; Jackson v. Hoover, 26 Ind. 511; Parker v. Wasley, 9 Gratt. 477; 2 Jarm. Wills, 841; 9 Mod. 154; 2 W. Bl. 976; 103 Ill. 11; Hoxie v. Hoxie, 7 Paige, 187; 5 Mason, 336; 169 Ill. 360, 48 N. E. 828; 48 La. Ann. 1036, 55 Am. St. Rep. 295, 20 So. 193; Loomer v. Loomer, 57 A. 167, 76 Conn. 522; 56 A. 148, 65 N. J. Eq. 417.

<sup>2</sup> All the papers which constitute the testamentary act must be taken as one whole, embracing will and codicils, and all papers so referred to as to be incorporated with the same in the probate. And all the parts and provisions of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole and operate together; and contradictory clauses should, if possible, be reconciled accordingly. Westcott v. Cady, 5 Johns. Ch. 343, 9 Am. Dec. 306; 8 Port. 380; 2 Jarm. Wills, 841; 9 Mod. 154; 6 T. R. 314; 16 Ves. 314; 82 Penn. St. 213; 80 N. E. 998, 226 Ill. 438. As to reconciling one portion of the will with another and considering principal and subordinate provisions, see 1 Curt. 419; 1 Bradf. 208. And see Sumpter v. Carter, 42 S. E. 324, 115 Ga. 893, 60 L. R. A. 274; Burroughs v. Jameson, 53 A. 688, 62 N. J. Eq. 651; McGuire v. Gallagher, 59 A. 445, 99 Me. 334; 50 S. E. 794, 71 S. C. 175; Mueller v. Buenger, 83 S. W. 458, 184 Mo. 458, 105 Am. St. Rep. 451, 67 L. R. A. 648; Hoffman v. N. E. Trust Co., 72 N. E. 952, 187 Mass. 205; 76 N. E. 1043, 190 Mass. 317; 91 S. W. 921, 193 Mo. 62, 4 L. R. A. (N. S.) 922; Bennett v. Bennett, 75 N. E. 339, 217 Ill. 434, 4 L. R. A. (N. S.) 470; 82 P. 755, 148 Cal. 184; Sigel's Estate, 62 A. 175, 213 Penn. 14, 110 Am. St. Rep. 615, 1 L. R. A. (N. S.) 397.

<sup>3</sup> McDonough v. Murdock, 15 How. 410, 14 L. Ed. 751.

<sup>4</sup> Harrison v. Nixon, 9 Pet. 483, 9 L. Ed. 201. And see Pennoyer v. Shelden, 4 Blatch. 319; Phill. (N. C.) Eq. 8; Clark v. Mosely, 1 Rich. Eq. 396, 44 Am. Dec. 229. Certain forms of expression which have become rules of property may affect the rule of intent. Mulliken v. Earnshaw, 58 A. 286, 209 Penn. 226. See Mueller v. Buenger, 83 S. W. 458, 184 Mo. 458, 105 Am. St. Rep. 541, 67 L. R. A. 648.

<sup>5</sup> Doug. 340; 4 Ves. 329; 6 Ch. D. 496; Needham v. Ide, 5 Pick. 510; 5 Denio, 646; Feltman v. Butts, 8 Bush 115; Hone v. Van Schaick, 3 N. Y. 538; 2 Paige, 366; 2 Jarm. Wills, 842.

and qualifying expressions in the context; and where a different meaning is fairly deducible from the whole will, the technical sense must bend to the apparent intention.<sup>1</sup>

471. Words occurring more than once in a will are presumed to be used always in the same sense, unless the context shows a contrary intention.<sup>2</sup>

472. Words in general are to be taken in their plain and usual sense, unless a clear intention to use them in another sense can be collected and that sense ascertained besides.<sup>3</sup>

473. A court gives effect to every part of a will, without change or rejection, provided an effect can be given to it, not inconsistent with the general effect of the whole will taken together.<sup>4</sup> But invalid ulterior limitations will not invalidate the primary dispositions of a will.<sup>4</sup> And where a testator's intention cannot wholly operate, it must be allowed to operate as far as possible.<sup>5</sup>

<sup>1</sup> 10 S. & R. 150; *Robertson v. Johnston*, 24 Ga. 102; *Daniel v. Whartenby*, 17 Wall. 639, 21 L. Ed. 661; 5 Mason 336; *Suydam v. Thayer*, 94 Mo. 49, 6 S. W. 502. See *W. N.* (1890) 125 ("unmarried" construed to mean "not under coverture" at the time referred to). Specific words, especially in real estate titles, acquire readily the legal and technical effect which usage and the decisions sanction. 8 Mass. 3, 5 Am. Dec. 66; 5 Pick. 510; 47 Barb. 263; 4 Blatch. 319. Yet the word "effects" has been held to embrace both real and personal property. *Cowp.* 299; 4 Wash. 645. "Residuary legatee" has been held to carry real estate; the word "heir" has been construed to mean child; "legatee" has from the context been read as "devisee"; and intent has controlled as to making "bequest" and "devise" synonymous. *Burwell v. Mandeville*, 2 How. 560, 11 L. Ed. 378; *Bland v. Bland*, 103 Ill. 11; *Weeks v. Cornwell*, 106 N. Y. 626; 13 N. E. 96; *Thompson v. Gaut*, 14 Lea. 310. See 15 N. J. L. 276 (testator's intent best carried out). Technical words need not be used at all.

<sup>2</sup> Such presumption is a slight one. See 1 Jarm. Wills, 842; 57 N. E. 1106, 161 N. Y. 636; 3 Drew. 472; *McIntosh's Estate*, 158 Penn. St. 528, 27 A. 1044; *Wood v. Wood*, 63 Conn. 324, 28 A. 520.

<sup>3</sup> 18 Ves. 466; 4 C. B. N. S. 790; 2 Jarm. Wills, 841; 2 Dem. 534; *Barney v. Arnolds*, 15 R. I. 78, 23 A. 45. As to conventional meaning, see *Hamilton v. Ritchie*, (1894) A. C. 310; 66 N. H. 434, 31 A. 900; 99 Cal. 30, 33 P. 751; 189 N. Y. 202, 82 N. E. 181; *Jacobs v. Prescott*, 65 A. 761, 102 Me. 63 (words popular in their popular or grammatical sense, and words technical in their technical sense); 62 A. 814, 102 Md. 649; *Allison v. Allison*, 44 S. E. 904, 101 Va. 537; 45 S. E. 324. Ordinary rules of grammar are favored. 66 N. E. 795, 183 Mass. 212. Punctuation, however, is of no great significance. 43 S. C. 878, 65 S. C. 390; 87 N. Y. S. 325.

Whenever a testator uses a word in one part of his will with a clear and definite meaning he is presumed to have intended the same meaning in other parts of the will. (1900) 1 Ch. 417.

<sup>4</sup> 4 Mass. 208; 80 N. E. 998, 226 Ill. 438; 72 N. E. 751, 213 Ill. 124; 126 Fed. 701; 6 Mass. 169, 4 Am. Dec. 107; 1 Desaus. 237; *Mutter's Estate*, 38 Penn. St. 314; 2 Ill. 276; 163 Ill. 149, 45 N. E. 259; *Dalton v. Scales*, 2 Ired. Eq. 521; 108 Penn. St. 314, 56 Am. Rep. 208; 136 Mo. 244, 37 S. W. 909.

<sup>5</sup> 35 N. Y. 340; *Tiers v. Tiers*, 98 N. Y. 568.

<sup>6</sup> 2 Jarm. Wills, 843; *Lepage v. McNamara*, 5 Iowa, 124; *Hadley v. Hadley*, 100 Tenn. 446, 45 S. W. 342; *Reilly v. Infirmary*, 87 Md. 664, 40 A. 894; 168 Ill. 273, 48 N. E. 582; 175 Ill. 521, 51 N. E. 749; 146 Ind. 625, 45 N. E. 1060

474. A later clause in a will must be deemed to affirm, not to contradict an earlier clause, if such construction can fairly be given.<sup>1</sup> But the mere position of particular sentences or clauses is by no means conclusive as against the real sense of the whole will; while at the same time position is a circumstance of weight where some general expression of the will yields, as it should, to a clear and specific inconsistent provision found elsewhere.<sup>2</sup>

475. A gift by words of general description is not to be limited by a subsequent attempt at a particular description.<sup>3</sup> But this presumption is overcome by an expression of intent to the contrary, as gathered from the whole instrument.<sup>4</sup>

476. The predominant idea of the testator's mind, if apparent, is heeded, as against all doubtful and conflicting provisions which might of themselves defeat it. All subordinate provisions bend in construction to the testator's main purpose and should, if possible, help carry it out, not obstruct.<sup>5</sup>

477. Courts will even change or mould the language of a will in construction, so as to carry out what it appears from reading the whole will that the testator actually intended.<sup>6</sup>

<sup>1</sup> See as to doubtful provisions reconciled, *Temple v. Sammis*, 97 N. Y. 526; 1 Curt. 419; *White v. Allen*, 81 Ind. 224; *Lucas v. Duffield*, 6 Gratt. 456; 10 La. Ann. 164; 153 N. Y. 243, 47 N. E. 283.

<sup>2</sup> Especially if subsequent in recital. *Markle's Estate*, 187 Penn. St. 639, 41 A. 304. And see 181 Penn. St. 349, 37 A. 516; 49 N. J. Eq. 98, 23 A. 125; 73 S. W. 262, 173 Mo. 572. As to same words in a clause applied to different objects, see 145 Penn. St. 540, 22 A. 972; 129 Ind. 59, 28 N. E. 310.

<sup>3</sup> *Martin v. Smith*, 124 Mass. 111; *Freeman v. Coit*, 96 N. Y. 63; 51 A. 1056, 94 Md. 773; 60 A. 789, 211 Penn. 297.

<sup>4</sup> *Andrews v. Schoppe*, 84 Me. 170, 24 A. 805; *Urich's Appeal*, 86 Penn. St. 386, 27 Am. Rep. 707; 97 Mass. 504.

<sup>5</sup> *Stimson v. Vroman*, 99 N. Y. 74, 1 N. E. 147, 3 Dem. 307; *Hitchcock v. Hitchcock*, 35 Penn. St. 393; *Workman v. Cannon*, 5 Harr. 91; 152 Fed. 775; *Thrasher v. Ingram*, 32 Ala. 654; *Rose v. McHose*, 26 Mo. 590. Cf. *Pickering v. Langdon*, 22 Me. 413.

<sup>6</sup> They have discarded words as surplusage which were senseless as they stood expressed in the instrument. 1 Jarm. Wills, 479; 12 East, 515; *Wright v. Denn*, 10 Wheat. 204, 6 L. Ed. 303. They have rejected or modified expressions in the will which were inconsistent with the main intention, or which indicated an intention which the law would not permit to take effect. *Mellor v. Daintree*, 33 Ch. D. 198, 206. They have transposed words so as to bring out the natural sense and the testator's obvious meaning. 2 Ves. 32; *Ferry's Appeal*, 102 Penn. St. 207; 2 Bradf. 420; 2 Md. 82; 5 Jones L. 351; *Christie v. Phyfe*, 19 N. Y. 344; 4 Rich. Eq. 22; 1 Jarm. Wills, 500. They have supplied words with the same object in view. *Cleland v. Waters*, 16 Ga. 496; 1 Jones Eq. 149; *Aulick v. Wallace*, 12 Bush. 531; 115 Penn. St. 120, 8 A. 768; 33 Ch. D. 198; 1 Jarm. Wills, 486; 7 T. R. 437; 6 East. 486; 166 Ill. 318, 46 N. E. 1113; 7 Houst. 488. They have dealt lightly with errors of syntax and punctuation, especially where the testator did not write out his own will. 87 Penn. St. 51; 19 S. C. 297, 45 Am. Rep. 777; 151 N. Y. 269, 45 N. E. 869; 48 La. Ann. 1036, 55 Am. St. Rep. 295, 20 So. 193. They have constantly read "and" as though it were "or," and *vice versa*, and in various other instances given words and



478. As to the treatment of repugnant parts, while varying and conflicting clauses should, if possible, be reconciled so as to make each clause operative, it has often been ruled that in case of invincible repugnancy, the latter clause ought to prevail over the former.<sup>1</sup> The effect, though usually to limit or qualify a former gift, may be to destroy it altogether.<sup>2</sup> If, moreover, any word or expression has no intelligible meaning, or is absurd, or repugnant to the clear intent shown in the rest of the will, it may be rejected.<sup>3</sup>

expressions a meaning quite different from their literal acceptance. *Doe v. Watson*, 8 How. 263; 1 Jarm. Wills, 505, 517, and cases cited. They have even gone so far as to change words which evidently were miswritten, so as to give a meaning precisely opposite to what the will expressed on its face; as in reading "dying without issue" as though it were "dying with issue," or "donee" as though it were "donor." 8 Mod. 59; 2 D. M. & G. 300; 2 Jarm. Wills, 843. For other changes, see 1 Jarm. Wills, 503-524. "Between" may thus be read as though written "among." 134 Penn. St. 507, 19 A. 705. And see 108 Penn. St. 314, 56 Am. Rep. 208 ("then"); 56 N. J. Eq. 507 ("child" read "children"); *White v. Institute of Technology*, 171 Mass. 84, 50 N. E. 512. And see *Home v. Noble*, 172 U. S. 383, 43 L. Ed. 486; 22 Ark. 567; 128 Mass. 370; 64 A. 461, 71 N. J. Eq. 327; 63 A. 500, 71 N. J. Eq. 37; 73 N. E. 556, 187 Mass. 480. But changes like these will not be made upon any mere conjecture, however reasonable, of what the testator meant, in opposition to the plain sense of the instrument as it stands. 2 Jarm. Wills, 843; 1 Sneed, 394; *Caldwell v. Willis*, 57 Miss. 555. All other things being equal, the natural and literal import of words and phrases is presumed to have been intended; and each word is to have its effect, if the general intent be not thwarted thereby. No words of a will are to be rejected if any intelligent meaning can be given them. 5 J. J. Marsh. 600; 3 La. Ann. 168; 8 Port. (Ala.) 380; 70 Penn. St. 147. Nor will language be distorted or meddled with, whose meaning is clear; but moulding or altering must be in furtherance of the purpose expressed or indicated in the context. 6 Munf. 114; *Listen v. Jenkins*, 2 W. Va. 62; 73 Miss. 188, 18 So. 893, 55 Am. St. Rep. 527; 37 N. J. Eq. 5. See *Bagot, Re*, (1893) 3 Ch. 348; L. R. 3 Eq. 487; 125 Mass. 509; 99 Tenn. 68, 41 S. W. 333; 108 Cal. 627, 41 P. 772, 49 Am. St. Rep. 97; 60 A. 682, 73 N. H. 237; 50 S. E. 41, 122 Ga. 183; *Dee v. Dee*, 72 N. E. 429, 212 Ill. 338 (general provision gives way to specific one); 73 N. E. 672, 187 Mass. 562.

<sup>1</sup> This doctrine appears to be deduced from the principle, fair enough in the comparison of expressions of different date, that the testator's latest expression should be preferred to all previous ones; a principle, however, which must be somewhat strained when applied to the various consecutive parts of what has been obviously shaped out to stand as the one full and contemporaneous expression. Such a rule, therefore, as here applied, is properly a last resort, and when all efforts at reconciliation fail; for the intention of the testator is to be gathered from a consideration of the whole contemporaneous will upon its face and a comparison of the different terms, and effect given to this intention throughout if it can be fairly and legally done. 1 Jarm. Wills, 472; L. R. 6 C. P. 500; 6 Ves. 100; 2 Met. 202; *Thrasher v. Ingram*, 32 Ala. 645; 7 Cush. 209; *Smith v. Bell*, 6 Pet. 84, 8 L. Ed. 328; 3 Whart. 162; 2 M. & K. 149; *Orr v. Moses*, 52 Me. 287; 6 Ind. 293; 74 Me. 413; *Heidelbaugh v. Wagner*, 72 Iowa, 601, 34 N. W. 439; *Adams v. Massey*, 76 N. E. 916, 184 N. Y. 62; 64 N. E. 545, 197 Ill. 554; 2 Paige, 122, 21 Am. Dec. 73; 10 B. Mon. 342; 11 Gill & J. 185, 35 Am. Dec. 277; *Robert v. West*, 15 Ga. 122; 17 Ala. 396; 22 Me. 430; *Van Vechten v. Keator*, 63 N. Y. 52; 65 Penn. St. 388; *Baxter v. Bowyer*, 19 Ohio St. 490. Mere reasons assigned, inaccurate reference, etc., do not defeat. 42 N. J. Eq. 504, 8 A. 886; (1896) 2 Ch. 353.

<sup>2</sup> 1 Jarm. Wills 472-485. This rule, though artificial, is of ancient standing. Co. Lit. 112b.

<sup>3</sup> 12 Mass. 537, 7 Am. Dec. 99; 1 Jarm. Wills, 480; *Needham v. Ide*, 5 Pick. 510; 2 Desaus. 32; 3 Ves. Jr. 521; *Davis v. Boggs*, 20 Ohio St. 550. As to clear intent to cut

479. **The heir-in-law shall not be disinherited by conjecture, but only by express words or necessary implication.**<sup>1</sup> This rule has been long asserted by the courts in England and America;<sup>2</sup> but the policy of modern times extends such a presumption rather, in favor of heirs and next of kin, generally,—that is to say, to any one or all, who would, independently of a will, have taken the property in question under the appropriate statutes of descent and distribution.<sup>3</sup>

480. **Thus is it particularly as to one's own children or lineal descendants;** and the nearer by blood to the testator is the heir or next of kin in natural relationship, the less do courts incline to construe the will as though the maker were devoid of natural affection, not to add a sense of duty.<sup>4</sup>

481. **No such presumption arises in favor of a testator's illegitimate relatives;** but, in the absence of clear intent on his part to the

down, see *Price v. Cole*, 83 Va. 343; 111 N. Y. 270, 18 N. E. 852; *Hochstedler v. Hochstedler*, 108 Ind. 506; 119 Ind. 525, 12 Am. St. Rep. 436, 22 N. E. 4; *Ilsley v. Ilsley*, 80 Me. 23, 12 A. 796; 79 Me. 177, 8 A. 885; *Wilmoth v. Wilmoth*, 34 W. Va. 426, 12 S. E. 731; *Banzer v. Banzer*, 156 N. Y. 429, 51 N. E. 291; 148 N. Y. 206, 42 N. E. 580; 186 Penn. St. 404, 40 A. 524; *Yost v. McKee*, 176 Penn. St. 381, 53 Am. St. Rep. 674, 35 A. 140; 153 N. Y. 134, 47 N. E. 274; 98 Tenn. 190, 39 S. W. 12; 116 Mich. 180, 74 N. W. 472; 107 Ill. 443. In various instances inconsistent gifts or devises have been reconciled in construction, by reading the later one as referring to a possible lapse of the former one or as dependent upon some contingency which is deducible from the instrument taken as a whole, or as importing a division of the gift. 5 B. & Ald. 536; 2 M. & Gr. 780. And see 5 Ex. 107; *Sherrat v. Bentley*, 2 M. & K. 165 (a moiety, etc.). Where a will can be construed as consistent with itself, the disastrous effect of repugnancy is avoided. *Stebbins v. Stebbins*, 86 Mich. 474, 49 N. W. 294.

<sup>1</sup> As to the technical "heir at law," see 483; *Grier, J.*, in *Smith v. Shriver*, 3 Wall. Jr. 219; 14 How. 390, 397, 14 L. Ed. 468; 2 Black. 408, 17 L. Ed. 292; *Coryton v. Helyar*, 2 Cox, 340, 348.

<sup>2</sup> 2 Stra. 969; 5 T. R. 558; 18 Ves. 40; 1 Jarm. Wills, 532; 1 Ib. 841; *Howard v. American, &c., Society*, 49 Me. 288; *Bender v. Dietrick*, 7 W. & S. 284; *Wright v. Hicks*, 12 Ga. 155, 56 Am. Dec. 451.

<sup>3</sup> 4 Beav. 318; *Goodwin v. Coddington*, 154 N. Y. 283, 48 N. E. 729. Family and kindred are preferred to utter strangers. See *Downing v. Bain*, 24 Ga. 372; *Wood v. Mitcham*, 92 N. Y. 375. And see *Dunlap's Appeal*, 116 Penn. St. 590, 9 A. 936; 62 Conn. 393, 499, 26 A. 482, 27 A. 77.

In general, an heir cannot be disinherited unless the estate is given by the will to some one else. *Coffman v. Coffman*, 85 Va. 459, 17 Am. St. Rep. 69, 2 L. R. A. 848, 8 S. E. 672; *Lawrence v. Smith*, 163 Ill. 149, 166, 45 N. E. 259; *Zimmerman v. Hafer*, 81 Md. 347, 32 A. 316.

<sup>4</sup> *Weatherhead v. Baskerville*, 11 How. 329, 13 L. Ed. 717; 1 Story, 426 (son or daughter); *supra*, 20; 5 Cr. C. C. 658 (posthumous child); *Lurie v. Radnitzer*, 166 Ill. 609, 46 N. E. 116; cf. 124 N. C. 200, 32 S. E. 556. But cf. as to presumptions overcome, 165 Ill. 561, 46 N. E. 240; *Heeb v. Heeb*, 93 Iowa, 416, 61 N. W. 934; 101 Tenn. 712, 50 S. W. 760. And see 6 How. 550, 12 L. Ed. 553; *Aspy v. Lewis*, 152 Ind. 493, 52 N. E. 756 (lineal issue as against collaterals). Infant children deserve solicitude particularly.

contrary, those who are legitimate shall take precedence and in America be regarded equally among themselves.<sup>1</sup>

481a. **Favor to either surviving spouse** is shown in modern testamentary construction.<sup>2</sup>

482. **As a broader principle, whatever the policy of the age and jurisdiction** for the time being may pronounce unwise or unjust, even though not really illegal, shall be presumed against, in the construction of a will, unless the plain intention of the testator appears to the contrary; a maxim which may serve for courts in the present and future as well as the past, and through all the shifting mutations of public authority or public opinion.<sup>3</sup>

483. **With regard to a devise without words of limitation the heir-at-law** is less favored in construction than formerly.<sup>4</sup>

484. **This sacrifice of the intended devisee to the heir was checked by another presumption**, that whenever the words of devise denoted the quantum of interest or property that the testator had in the lands devised, then the whole extent of such interest would pass

<sup>1</sup> See *Appel v. Byers*, 98 Penn. St. 479; *Scholl's Estate*, 100 Wis. 650, 76 N. W. 616. But by plain reference in the will, legitimate and illegitimate children may be placed on an equal footing. *Stewart v. Stewart*, 31 N. J. Eq. 398; (1897) 2 Ch. 208, 238; § 534; (1905) P. 137. As among a testator's collateral relatives or strangers, favoring presumptions carry little or no weight against the testator's apparent meaning. See *Rawlins's Trusts*, 45 Ch. D. 299; *Jodrell, Re*, 44 Ch. D. 590; aff. App. Cas. (1891) 304. As to adopted child, see 194 Mass. 540; 61 A. 598, 27 R. I. 209, 495; *Pierce v. Knight*, 64 N. E. 692, 182 Mass. 72 (after-born children of nephew or niece).

<sup>2</sup> *Heeb v. Heeb*, 93 Iowa, 416, 61 N. W. 932; *Hawhe v. Chicago R.*, 165 Ill. 561, 46 N. E. 240; *Moffett v. Elmendorf*, 152 N. Y. 475, 57 Am. St. Rep. 529, 46 N. E. 845. And this often as against the common offspring.

<sup>3</sup> See *supra*, 22, 77, 165; *Scarborough v. Baskin*, 44 S. E. 63, 65 S. C. 558. We cannot, however, deny that the intention of a testator, though harsh and unreasonable, must guide, when clearly expressed, if it violates no principle of law or morality. *Brearley v. Brearley*, 9 N. J. Eq. 91.

<sup>4</sup> A devise to a person without words of limitation conferred a life estate only, under the old and artificial rule. Co. Lit. 96; Cowp. 306; 1 Salk. 239; *Wright v. Denn*, 10 Wheat. 238, 6 L. Ed. 312; 13 Wend. 582; *Lummas v. Mitchell*, 34 N. H. 45; *King v. Ackerman*, 2 Black, 408, 17 L. Ed. 292. But this rule operated very unjustly; and the courts showed much astuteness to avoid an interpretation which in many instances must have subverted the testator's purpose. See Co. Lit. 96 ("forever"); *Rose v. Hill*, 3 Burr, 1881 ("executors, etc."), *Wood v. Wood*, 1 B. & Ald. 518 ("family"). And see 3 Burr, 1895; 1 Munf. 537; *Boal v. Mix*, 17 Wend. 127; 3 Binn. 483; *Greenwood v. Greenwood*, 178 Ill. 387, 53 N. E. 101 (non-resident alienage). Rule relaxed in *Plimpton v. Plimpton*, 12 Cush. 463; 3 Greenl. 241; 1 Grant Cas. 240. In many States it is now held that whenever an intention to dispose of the fee can by any fair inference be drawn from the will, the technical rule must be excluded; and that very slight circumstances will be laid hold of as indicating such an intention. 11 Mass. 532; *Neide v. Neide*, 4 Rawle, 82; 7 Ind. 282; 41 Barb. 529; *Hawkins's Wills*, 131, *Swords' American note*; *Lummas v. Mitchell*, 34 N. H. 46; *Cleveland v. Spilman*, 25 Ind. 99; *Packard v. Packard*, 16 Pick. 193; *Mulvane v. Rude*, 146 Ind. 476, 45 N. E. 659. And the fact that real and personal estate are given together by the same clause and in the same language and connection has been held of great moment, if not conclusive, as passing a fee.

to the devisee.<sup>1</sup> So, too, has an indefinite devise been enlarged by the imposition of a charge, however small, or a gift over or a devise to trustees.<sup>2</sup>

485. This refined construction in favor of the heir, together with the refinements of exception built upon it, now gives way to the modern rule of interpretation as defined in statutes, English and American.<sup>3</sup> This modern rule treats a devise of lands, though without words of limitation, as passing the fee simple to the devisee, unless an intention appear to the contrary.<sup>4</sup>

486. Until the death of the testator a will does not operate or take effect, nor are any rights acquired under it; although, doubtless, it may speak for some purposes from the date of execution, and for others from the death of the testator, according to the particular intent manifested in the instrument itself.<sup>5</sup>

<sup>1</sup> As in using the word "estate," etc. 3 K. & J. 652; *Child v. Wright*, 7 East, 259; *Lambert v. Paine*, 3 Cranch, 97; *Hawkins Wills*, 131-133. Cf. 1 Exch. 535; 9 Gray 17. See as to words "effects," "property," "all I have," etc., 4 Wash. C. C. 645; 18 Ves. 193; 3 Sim. 398; 6 Ohio St. 488; 9 Penn. St. 142; *Chamberlain v. Owings*, 30 Md. 453.

<sup>2</sup> 5 East, 87; 3 K. & J. 170; 11 Hare, 232; 3 Burr, 1618; *Shaw v. Hussey*, 41 Me. 498; 1 Harr. 27; 22 Wend. 139; 8 T. R. 597; 3 M. & G. 92; *Hawkins Wills*, 134-138.

<sup>3</sup> *Hawkins Wills*, 139, note by Swords. As to local statutes, see 146 Ind. 476, 45 N. E. 659; 80 N. E. 249, 225 Ill. 408. Some American States legislated to this effect before 1787. *Hawkins Wills*, 139, note by Swords; 4 McCord. 476.

<sup>4</sup> Stat. 1 Vict. c. 26, § 28; (1894) App. Cas. 125. 1 Jarm. Wills, 318-337; 2 ib. 840; *Wakefield v. Phelps*, 37 N. H. 295; 17 Wend. 393; 21 Conn. 616; 5 Iowa, 196, 68 Am. Dec. 696; *Means v. Evans*, 4 Desau. 242; 21 Tex. 713.

<sup>5</sup> The general rule appears to be that the will shall speak rather from the date of the testator's death than from the date of execution, unless its language may fairly be construed to the contrary. 21 Conn. 616 *supra*. But intention governs after all; and if the will uses the word "now," or a verb in the present tense, or other expression pointing at the present, it must be construed accordingly. 1 Jarm. Wills, 318 and Bigelow's note. It is even possible that the provision in a will should, by its express terms, refer to some expected date or event happening between the date of execution and that of the testator's death, and require a corresponding interpretation. 37 N. J. Eq. 482. But as to events subsequent to death, see *Carney v. Kain*, 40 W. Va. 758, 23 S. E. 650; *Gray v. Hattersley*, 50 N. J. Eq. 206, 24 A. 721. Validity and construction depend generally upon law in force at testator's death. *Supra*, 11; 60 A. 915. 211 Penn. 364, 107 Am. St. Rep. 581; *Bourke v. Boone*, 51 A. 396, 94 Md. 472; 102 N. Y. S. 808; 57 A. 428, 66 N. J. Eq. 172; *Peet v. Peet*, 82 N. E. 376, 229 Ill. 341, 13 L. R. A. (N. S.) 780; 87 S. W. 306, 27 Ky. Law, 946. Concerning after-acquired land under the old rule, see *supra*, 29. A will as to personalty is still presumed to speak or apply to one's personal estate as it shall exist at his death. *Ib.*; *Garrett v. Garrett*, 2 Strobb. Eq. 272; *Canfield v. Bostwick*, 21 Conn. 553; *Nichols v. Allen*, 87 Tenn. 131, 9 S. W. 530; 13 A. 156, 68 Md. 523 (property unexpectedly increased by a large inheritance). The preferable rule as to after-acquired property stands thus, with the aid of our modern local legislation: that descriptions, whether of real or personal estate, or of both together, the subject of gift, refer to and comprise *prima facie* the property answering to that description at the death of the testator; but that at all events the intention manifested by the will shall prevail. Stat. 1 Vict. c. 26, § 24; *Brimmer v. Sohler*, 1 Cush. 133; 2 Swan, 407; 33 Fed. 812; 69 Iowa, 617, 29 N. W.

487. **Codicils should be construed with the will itself**; and from its very nature a codicil may, as a context, confirm, alter, or altogether revoke an intention expressed in the body of the instrument to which it is annexed.<sup>1</sup>

488. **Some effect should, at all events, if possible, be given to a will**, however obscure and informal its language; and it is only where a reasonable construction and the discovery of the intent of the testator are hopeless, that all effect should be denied to the instrument.<sup>2</sup>

488a. **A change of condition in the estate or circumstances** may sometimes affect the construction of a will, so as to aid the testator's wishes.<sup>3</sup>

489. **Intended compliance with the law is presumed**; and upon this principle provisions under a will have frequently been upheld which, if otherwise construed, must have failed for illegality.<sup>4</sup>

632; 59 A. 450, 70 N. J. L. 672; *Patty v. Goolsby*, 51 Ark. 61, 9 S. W. 846; *Welborn v. Townsend*, 31 S. C. 408, 10 S. E. 96; *Haley v. Gatewood*, 74 Tex. 281, 12 S. W. 25; *Paine v. Forsaith*, 84 Me. 66, 24 A. 590; 74 Me. 402. The presumption against one's intending a partial intestacy may come in aid of such a rule of construction. 490, *post*.

<sup>1</sup> 1 Cush. 118; *Morley v. Rennoldson*, (1895) 1 Ch. 449; *Kelley v. Snow*, 70 N. E. 89, 185 Mass. 288, 468, *supra*. 12 Gill & J. 288; *Armstrong v. Armstrong*, 14 B. Mon. 333; 7 Ala. 386; 163 Mass. 130, 132, 39 N. E. 1015. A will and codicil are to be reconciled if possible; but if plainly inconsistent, and the more so if the later instrument expressly revokes whatever is inconsistent with it, the codicil must prevail; for a later repugnant disposition as against an earlier stands on a footing of presumption far stronger than the later clause in one and the same contemporaneous instrument. *Thompson v. Churchill*, 60 Vt. 371, 14 A. 699; *Ward v. Ward*, 105 N. Y. 68, 11 N. E. 373; 22 Me. 413; 3 Md. Ch. 42; *Lee v. Pindle*, 12 Gill & J. 288; 138 Penn. St. 104, 22 A. 20. Cf. *supra*, 478; *Ives v. Harris*, 7 R. I. 413; 2 Jones Eq. 13; 7 Jones L. 612; 9 Cush. 291; *Lyman v. Morse*, 69 Vt. 325, 37 A. 1047. As to an independent trust to which the codicil refers, see 140 Mass. 28, 2 N. E. 119. While the old rule denying that a will could convey after-acquired lands was in force, a codicil might be very serviceable for such a conveyance.

<sup>2</sup> *Den v. Crawford*, 8 N. J. L. 90; *Wootton v. Redd*, 12 Gratt. 196; *Morton v. Woodbury*, 153 N. Y. 243, 47 N. E. 283. Operative construction preferred. 1 Jarm. Wills, 356; 2 ib. 842; 3 Burr. 1626; 30 Ky. L. R. 857, 99 S. W. 925; 108 N. W. 979, 77 Neb. 163; 33 So. 61, 109 La. 38; L. R. 5 H. L. 548; *Lomax v. Shinn*, 162 Ill. 124, 44 N. E. 495. Effect given to all provisions, if possible. See ch. 3, *post*.

<sup>3</sup> *Terry v. Smith*, 42 N. J. Eq. 504, 8 A. 886; *Bills v. Putnam*, 64 N. H. 554, 15 A. 138; *Wikle v. Woolley*, 81 Ga. 106, 7 S. E. 210; *Olcott v. Tope*, 72 N. E. 751, 213 Ill. 124.

<sup>4</sup> 8 Ired. Eq. 32; *Andrews v. Rice*, 53 Conn. 576, 5 A. 708; 152 Penn. St. 192, 201, 25 A. 513; *Nightingale v. Sheldon*, 5 Mason, 336; *Pruden v. Pruden*, 14 Ohio St. 251; 8 Rich. Eq. 241; *Thrasher v. Ingram*, 32 Ala. 645. But as to future enactments, see *Taylor v. Mitchell*, 57 Penn. St. 209.

Where legal and illegal bequests or trusts are found together, the disposition is to uphold those which are legal, provided they may stand independently and apart; though it would be otherwise if the legal and illegal bequests or trusts were so inseparably connected as to constitute an entire scheme, for here they must fall together for illegality. 120 Am. St. Rep. 728, 205 Mo. 202, 104 S. W. 1; *DeWitt's Will*, 188 N. Y. 567, 80 N. E. 1108; 105 N. Y. 134, 11 N. E. 390. Cf. *Andrews v. Lincoln*, 58 A. 898, 95 Me. 541, 56 L. R. A. 103; *Murphey v. Brown*, 62 N. E. 275, 159 Md. 106. And see 54 A. 1072, 97 Me. 427; 34 So. 52, 109 La. 994.

489a. **The presumption is against a revocation of what is once given, wherever intent is in doubt.**<sup>1</sup>

490. **No presumption of an intention to die intestate as to any part of his property is allowable when the words of a testator's will may fairly carry the whole; for no one is supposed to make his will without meaning to dispose of all his estate.**<sup>2</sup>

491. **Concerning the local law by which wills are interpreted.** As to real property, the well settled rule of England and the United States is that, no matter where the will was made or in what language written, the law where the land lies must govern in the construction of the will as well as in validity and method of execution.<sup>3</sup> A will of personalty (or of movables, rather) is, on the other hand, governed in construction by the law of the testator's last domicile; and here again the principle is a broad one, embracing questions of validity as well as interpretation.<sup>4</sup>

<sup>1</sup> *Goodwin v. Coddington*, 154 N. Y. 283, 48 N. E. 729

<sup>2</sup> *Johnson v. Brasington*, 156 N. Y. 181, 50 N. E. 589; 168 Ill. 214, 48 N. E. 94. But intent prevails. *Given v. Hilton*, 5 Otto, 591; 14 N. J. Eq. 124; *Gilpin v. Williams*, 17 Ohio St. 396; *Boyd v. Latham*, Busb. L. 365; 2 Sneed, 387; *Raudenbach's Appeal*, 87 Penn. St. 51; *Gallagher v. McKeague*, 125 Wis. 116, 103 N. W. 233; *Welsh v. Gist*, 61 A. 665, 101 Md. 606; *Willat, Re*, (1905) 1 Ch. 378; 221 Ill. 59, 77 N. E. 454; 102 Penn. St. 207; 135 Mass. 458; 7, 449; 172 Ill. 323, 50 N. E. 176; *Alsop v. Alsop*, 67 Conn. 249, 34 A. 1106; *Bishop v. McClelland*, 44 N. J. Eq. 450, 16 A. 1; *Boston Co. v. Coffin*, 152 Mass. 95, 8 L. R. A. 740, 25 N. E. 30; *Carney v. Kain*, 40 W. Va. 758, 23 S. E. 650; 172 Ill. 323, 50 N. E. 176; 99 Tenn. 68, 41 S. W. 333. It is further to be presumed that a general residuary gift will carry particular property not otherwise disposed of. *Bagot, Re*, (1893) 3 Ch. 348; 145 Ill. 625, 34 N. E. 467.

<sup>3</sup> 1 Jarm. Wills, 1, 2; 2 ib. 840; Story, Conf. Laws, § 474; *Kerr v. Moon*, 9 Wheat. 565, 6 L. Ed. 161; Pre. Ch. 577; *Bull's Will*, 111 N. Y. 624, 19 N. E. 503; 82 N. E. 376, 229 Ill. 341, 13 L. R. A. (N. S.) 780; *Eyre v. Storer*, 37 N. H. 114 (right of posthumous child). See Exrs. post, 15-20.

<sup>4</sup> 1 Jarm. Wills, 2; 72 N. E. 75, 186 Mass. 464; 103 Fed. 39; *Fergusson's Will*, (1902) 1 Ch. 483; Story, Conf. Laws, § 465; 2 Sim. 1; 25 Beav. 218; Exrs. post, 15-20; *Rockwell v. Bradshaw*, 67 Conn. 8, 34 A. 758. But the law where the will was made is allowed some statutory force. A testamentary disposition of personal property valid at the testator's last domicile, will, moreover, be respected by tribunals elsewhere as valid, and allowed in comity to take effect, where the law is different, if neither a local statute nor fundamental public policy positively forbids. As e.g., in a gift in contravention of the local rule of perpetuities. *Dammert v. Osborn*, 140 N. Y. 30, 35 N. E. 407; 141 N. Y. 564, 35 N. E. 1088. And see *Gaines's Succession*, 45 La. Ann. 1237, 14 So. 233.

Where, then, one's will purports to dispose of property within and realty without the domicile, it may happen that the former disposition holds valid, but not the latter. But a clause which grants both real and personal property upon the same trust is generally severable. *Ib.*; *Knox v. Jones*, 47 N. Y. 389. Yet as to the validity of a bequest (e.g., whether a certain corporation can take) the law of the legatee's domicile will prevail in comity unless the law of testator's domicile absolutely prohibits. *Inglehart v. Inglehart*, 204 U. S. 478, 27 S. Ct. 329, 51 L. Ed. 575. See 104 N. Y. S. 4. And see *Davis v. Upson*, 70 N. E. 602, 209 Ill. 26 (bonds held by agent in another State), *Gross's Goods*, (1904) P. 289 (law of domicile as to revocation by marriage); *Beaumont's Estate*, 65 A. 799, 216 Pa. 350 (change of domicile as to invalid execution).

492. **Proceedings for obtaining the construction of a will**, but not to reform it, are usually by bill in equity (irrespective of ampler statute provisions); and such proceedings are not entertained before a real necessity arises, nor unless instituted or submitted by parties duly interested; usually, however, by an executor or trustee claiming under the will.<sup>1</sup>

<sup>1</sup> See 102 Mich. 510, 61 N. W. 7; 63 Conn. 299, 27 A. 585; 109 Ala. 457, 19 So. 810. Costs or fees are not usually allowed to the losing claimant in a suit for construction. *Kimball v. Bible Society*, 65 N. H. 140, 23 A. 83. But see (1897) 2 Ch. 407.

In some States, proceedings for construction of a will may be had by petition in the court of probate, with a right of appeal. 144 Mass. 135, 59 Am. Rep. 65, 10 N. E. 758.

## CHAPTER II.

### DETAILS OF TESTAMENTARY CONSTRUCTION.

493. **Legislation now fixes to some extent the local rule of construction, on certain points to be here considered; and the present policy in many States is to apply the same general construction to real and personal property, as far as possible, discarding ancient artificial distinctions between those two kinds.**<sup>1</sup>

494. **A devise of one's "real estate" or "lands" relates, strictly speaking, to freeholds so as to exclude the idea of chattels real and leaseholds.**<sup>2</sup> But this is only a presumption;<sup>3</sup> and by Statute 1 Vict. c. 26 the presumption is reversed.<sup>4</sup>

495. **Land which the testator held as trustee or mortgagee is presumably included in a devise of lands.**<sup>5</sup>

496. **All reversionary interests will pass unless a clear intention to exclude the same be shown, under a general devise of one's land or real estate.**<sup>6</sup>

497. **Lands which the testator has contracted to purchase pass *prima facie* under a general devise, though not actually conveyed to him.**<sup>7</sup>

<sup>1</sup> See *Andrews v. Schoppe*, 84 Me. 170, 24 A. 805, and cases cited.

<sup>2</sup> See old rule *prima facie*. Cro. Car. 293; 1 De G. F. & J. 160; 2 B. & P. 303.

<sup>3</sup> *Ib.*; 1 M. & K. 371.

<sup>4</sup> Leaseholds presumably included. 28 Ch. D. 66; *Knight, Re*, 34 Ch. D. 518. Corresponding enactments may be found in some parts of the United States; but neither legislature nor court has given the subject much attention in this country. *Chase v. Stockett*, 72 Md. 235, 19 A. 761; *Lumber Co. v. Rogers*, 145 Mo. 445, 46 S. W. 1079. "Unimproved" real estate is to be distinguished from that with dwellings or other buildings upon it, such as is called "improved" real estate. *Robb v. Robb*, 173 Penn. St. 620, 34 A. 237.

<sup>5</sup> 8 Ves. 435; *Jackson v. Delancy*, 13 Johns. 554, 7 Am. Dec. 403; 1 Dutch. 161; *Heath v. Knapp*, 4 Penn. St. 228; 4 Kent Com. 538, 539; 1 Jarm. Wills, 698.

But intent prevails. L. R. 9 Eq. 570; *Brown, Re*, 3 Ch. D. 156. See 10 Rich. Eq. 484; 3 Desau. 346; *Morley, Re*, 10 Hare, 293; *Rackham v. Siddall*, 16 Sim. 297; 8 Ves. 436; *Packman, Re*, 1 Ch. D. 214. As to a devise in dereliction of the testator's duty, see *Wills v. Cooper*, 1 Dutch. 161; 2 Edw. Ch. 547; 35 S. C. 422. And though a general devise should pass whatever legal estate under a mortgage the testator had to transmit, it would not include the beneficial enjoyment of the money secured by the mortgage, since that is personal estate. *Woodhouse v. Meredith*, 1 Mer. 450. See *Martin v. Smith*, 124 Mass. 111. Cf. *Carter, Re*, (1900) 1 Ch. 801 (intent regarded); 50 N. J. Eq. 547, 25 A. 325; *Dickerson's Appeal*, 55 Conn. 223, 15 A. 99; 69 Conn. 416, 38 A. 219. But cf. *Clowes, Re*, (1893) 1 Ch. 214.

<sup>6</sup> 1 Jo. & Lat. 389; *Church v. Mundy*, 15 Ves. 396; *Hayden v. Stoughton*, 5 Pick. 538; 9 W. & S. 128. See *Jones v. Skinner*, 5 L. J. Ch. N. S. 87; 3 P. Wms. 56.

<sup>7</sup> 10 Mod. 518; *Collison v. Girling*, 4 My. & Cr. 75. As for lands contracted to sell, see *Atwood v. Weems*, 99 U. S. 183, 25 L. Ed. 471; 1 J. & W. 479; *Covey v. Dinsmoor*, 80 N. E. 998, 226 Ill. 438 (unpaid note of purchaser).



498. "Land" is not so broad a term as "tenements" and "hereditaments"; for these include every species of realty, corporeal or incorporeal, that may be holden or inherited.<sup>1</sup> Yet here again a testator's intention controls.<sup>2</sup>

499. "Messuage" and "premises" are defined in this connection.<sup>3</sup>

500. Such words as "house," "mill," "store," etc., receive consideration also.<sup>4</sup>

501. "Appurtenances" and similar expressions added, tend to uphold a generous construction of one's devise.<sup>5</sup> Yet appurtenances are things which pass as incident to the principal thing; and if the house be conveyed or devised, whatever is incident goes naturally with it.<sup>6</sup>

502. "Farm," "freehold," "home," etc., are also considered in the reports.<sup>7</sup>

<sup>1</sup> Bouv. Dict. "Land," "Tenements," "Hereditaments." See 1 Jarm. Wills, 777; 11 H. L. Cas. 375 (tithes, etc., under the broader terms).

<sup>2</sup> *Ib.*; 2 Leon, 41. See 31 Ch. D. 314; *Wright v. Denn*, 10 Wheat. 204, 238, 6 L. Ed. 303 (whether fee passes).

<sup>3</sup> Bouv. Dict. "Messuage." 11 Co. 26; 8 B. & C. 25. See as to "garden," etc., *Cro. El.* 89; 2 Saund. 400; 1 Jarm. Wills, 778-781; Bouv. Dict. "Premises"; 1 East, 456; 7 C. B. 709; *Rogers v. Smith*, 4 Penn. St. 93; 3 Mason, 280.

<sup>4</sup> See Bouv. Dict. for such words, as "house," "mansion," "cottage," etc., importing a larger or smaller curtilage.

A devise of the house will be presumed to carry that which is accessory and needful for its beneficial use and enjoyment, and no more; admitting, however, that a devise deserves a more flexible interpretation than a grant. But the devise of a house does not *prima facie* include adjacent lands or lots, with buildings on them which tenants occupy. 1 Jarm. Wills, 780; 2 T. R. 468; 146 Mass. 373, 15 N. E. 899; *Steele v. Midland, R., L. R.*, 1 Ch. 275; *Brown v. Saltonstall*, 3 Met. 423. Cf. 1 P. Wms. 600. As to "barn," see *Bennet v. Bittle*, 4 Rawle, 339; 48 S. C. 408. Irrigation company stock as an appurtenance. *Thomas's Estate*, 81 P. 539, 147 Cal. 236. Erections, too, for business and trade are distinguished from those for domestic purposes in such a connection. Nevertheless, each will stands by its own intent as manifested by its whole tenor. For the devise of "house and lot," see 37 N. J. Eq. 482.

For devise of a "mill," "factory," "store," "warehouse," or other building for business purposes, see 3 Mason, 280; 4 Edw. Ch. 545; *Blaine v. Chamber*, 1 S. & R. 169. As to a devise of "all my water privileges," etc., see *Nye v. Hoyle*, 120 N. Y. 195, 24 N. E. 1.

<sup>5</sup> 1 Jarm. Wills, 781, 782; *Cro. El.* 113. Cf. 1 B. & P. 53; 16 M. & W. 494, *per Parke, B.*; *Smith v. Ridgway*, L. R. 1 Ex. 46.

<sup>6</sup> See Bouv. Dict. "Appurtenances"; *Story, J.*, in 3 Mason, 280. Land may pass under the term "appurtenances" in a will, to give effect to the intention. *Otis v. Smith*, 9 Pick. 293. See 12 Pick. 436. As to the bequest of a shot-tower, etc., with "all the appurtenances," in carrying a quantity of unmanufactured materials in the building, see *Sparks's Appeal*, 89 Penn. St. 148, 33 Am. Rep. 740. See further, 1 Bing. 483; 2 B. & Ad. 680; *Josh v. Josh*, 5 C. B. N. S. 454.

<sup>7</sup> "Farm" has come to mean a tract devoted to agriculture, whether owned by the cultivator or not. 2 Bl. Com. 17, 42; Bouv. Dict. "Farm"; *Aldrich v. Gaskill*, 10 Cush. 155. And see 9 East, 448; 1 Jarm. Wills, 785; *Griscom v. Evens*, 40 N. J. L. 402; 57 A. 114, 76 Conn. 459; 31 Ch. D. 314; *Gafney v. Kenison*, 64 N. H. 354, 10 A. 706. A "home" or "homestead" applies naturally to the place of family residence and to no land distinct and separate from it. *McGehee v. McGehee*, 74 Miss. 386, 21

503. A devise of the "rents and profits" of land has from the days of Coke been considered as passing *prima facie* the land itself.<sup>1</sup>

504. As to terms in personal property, "mortgages," "securities for money," etc., are words liberally treated when used in a will.<sup>2</sup>

505. The gift of "money," or "moneys," "cash," etc., is considered.<sup>3</sup>

So. 2; *Smith v. Dennis*, 163 Ill. 631, 45 N. E. 267; *McKeough v. McKeough*, 69 Vt. 34, 41, 37 A. 275; 14 Iowa, 73; *Moore v. Powell*, 95 Va. 258, 28 S. E. 172. As to "upland," see 115 Ala. 328, 22 So. 154. And see *Seal, Re*, (1894) 1 Ch. 316.

<sup>1</sup> Co. Lit. 4 b; 2 B. & Ad. 42; 2 D. M. & G. 781; 1 Jarm. Wills, 797; *Sammis v. Sammis*, 14 R. I. 123. So as to its "income." *Mannox v. Greener*, L. R. 14 Eq. 456; *Earl v. Rowe*, 35 Me. 414, 58 Am. Dec. 714; *Ryan v. Allen*, 120 Ill. 648, 12 N. E. 65; 90 Me. 463, 38 A. 365. Such a devise without words of inheritance added, carried *prima facie* a life estate only; but under the Statute of Victoria, a fee simple rather is presumed, or at least the whole interest which the testator had power to dispose of. See 1 Vict. c. 26, § 28; *Hodson v. Ball*, 14 Sim. 571; *Mannox v. Greener*, *supra*. Cf. *Collier v. Grimesey*, 36 Ohio St. 17; 34 R. I. 257. A gift of the income for life is a gift of the life estate, and a gift of the perpetual income is a gift of the fee. 90 Me. 463, 38 A. 365; 45 A. 73, 194 Penn. 152, 75 Am. St. Rep. 269.

Where one devises the "use and occupation" or the "free use" of land, a right to let or assign the interest is implied, and not personal use and occupation alone, unless the context imposes the narrower construction. 4 T. R. 177; 4 Jur. N. S. 199; 1 Jarm. Wills, 798; *Wilson v. Curtis*, 90 Me. 463, 38 A. 365.

<sup>2</sup> 1 Jarm. Wills, 699; 5 De G. & S. 644; *Renvoize v. Cooper*, 6 Mad. 371; 5 Sim. 451 (all testator's interest carried in both money and security, including fee of the land). Cf. 495, *supra*. And see *Carter, Re*, (1900) 1 Ch. 801.

But a bequest of "securities for money," unless apt words are added, will not pass shares in a stock company. *Ogle v. Knipe*, L. R. 8 Eq. 434; 21 L. J. Ch. 843. Nor does a bequest of "money and securities for money" carry a debt which is unsecured. *Mason's Will, Re*, 34 Beav. 498. And see 1 Schoul. Pers. Prop. 353, 375. But to this word "security" present usage gives a generous scope far beyond its literal meaning; and bills of exchange, bonds, public and private, and judgments have thus passed under a will, not to mention mortgage notes, or property held in pledge. L. R. 8. Ex. 37; 3 De. J. & S. 577; 1 Jo. & Lat. 475. And see *Callow v. Callow*, 42 Ch. D. 550 (vendor's lien for unpaid purchase-money).

<sup>3</sup> A bequest of "money" standing by itself will not be presumed to carry bills of exchange, promissory notes, bonds, mortgages, stock, or other muniments in the nature of incorporeal chattels or securities payable in money. 15 Ves. 327; *Kay*, 369; *Beatty v. Lalor*, 15 N. J. Eq. 108; 1 Jarm. Wills, 768; 1 Turn. & Russ. 272. See Schoul. Pers. Prop. 335-352. But current bank notes on hand and such as constitute a legal tender should be included, as well as metal money. *Brooke v. Turner*, 7 Sim. 671. As for money not on hand, but in the hands of somebody else, there is some question; and neither an unpaid legacy nor an unpaid debt, secured or unsecured, from a third party, nor any other unrealized money right, will pass *prima facie* as money. *Mason's Will, Re*, 34 Beav. 494; 4 K. & J. 426; L. R. 16 Eq. 475; 7 D. M. & G. 55; 3 Beav. 342. Money on special deposit with another, and even money due on general deposit from a bank, is favorably regarded as passing under a will; while as to a savings-bank deposit, earning interest and not subject to check, there is conflict. 7 D. M. & G. 55; *Parker v. Marchant*, 1 Phill. 360; *Beatty v. Lalor*, 2 McCart. 110; 2 H. L. Cas. 31. Money at a bank on general deposit may pass under a bequest of "debts." 1 Mer. 541 n; 2 H. L. Cas. 31. Cf. *Beatty v. Lalor*, *supra*, and *Dabney v. Cottrell*, 9 Gratt. 580; 97 Va. 434, 34 S. E. 60; *Fowler v. Fowler*, 63 N. H. 244; *Decker v. Decker*, 121 Ill. 341, 12 N. E. 750; *Smith, Re*, 42 Ch. D. 302; 37 Ch. D. 481.

But that vague and comprehensive colloquial sense of which the word "money" is capable justifies giving a much wider sense to this word when reference to the context shows it to have been the testator's real meaning. And accordingly the general residue of

506. "**Movables**" may well denote "**personal property**" in the widest sense of the law. But as between corporeal and incorporeal personalty, an uncertain stand is taken in the construction of wills.<sup>1</sup>

507. The bequest of the interest, income or produce of a fund in personalty to one and his heirs forever, or without limit as to continuance or time, is a bequest of the *corpus* of the fund itself; and this effect will be given by construction, whether the gift be made directly to the legatee or through a trustee's intervention.<sup>2</sup> But where a life interest only is intended, the gift of income entitles merely to a life estate in the property.<sup>3</sup>

508. The word "**chattels**," and perhaps the word "**goods**," and certainly the term "**goods and chattels**," in a will should be presumed to carry the whole personal estate of every description, if unrestrained by the context, including corporeal and incorporeal property of the nature of movables.<sup>4</sup>

509. "**Effects**," "**possessions**," "**things**," are comprehensive terms.<sup>5</sup>

one's whole personal estate will pass under such a bequest, wherever a just consideration of the whole will and the circumstances of the testator requires this construction. L. R. 11 Eq. 234; *Morton v. Perry*, 1 Met. 469; 1 Grant, 158; *Fulkerson v. Chitty*, 4 Jones Eq. 244; *Paul v. Ball*, 31 Tex. 10; 72 Tex. 224, 9 S. W. 881 (claim on an unsatisfied judgment); 1 Jarm. Wills, 769-773. And see a gift of the "balance of my money" in the will of an ill-educated person, as importing a gift of all the residue of the estate, both real and personal. *Miller, Re*, 48 Cal. 165, 17 Am. Rep. 422. Even proceeds of the sale of land have been carried under a residuary gift of "money." *Sweet v. Burnett*, 136 N. Y. 204, 32 N. E. 628. And once more the context may give "money" an enlarged sense, yet so qualified as to fall short of embracing the entire residue. See 26 Beav. 218; 6 Sim. 67; *Paup v. Sylvester*, 22 Iowa, 371. And see *Levy's Estate*, 161 Penn. St. 189, 28 A. 1068.

Other terms than simply "money" are often used in this connection. "Money due to me" carries unpaid debts. 9 Sim. 16; *Martin v. Hobson*, L. R. 8 Ch. 401; *Petty v. Willson*, L. R. 4 Ch. 574; 3 Beav. 342; 1 Whart. 362. "Ready money" is a term so specific as to require a stricter interpretation than the word "money" by itself. See *Parker v. Marchant*, 1 Phill. 356 (money in bank included); 3 De G. & Sm. 462. "Cash" is a word of import at least as strict as "ready money"; and so is "money in hand." *Beales v. Crisford*, 13 Sim. 592; *Smith v. Burch*, 92 N. Y. 228.

<sup>1</sup> 1 Schoul. Pers. Prop. 3, 4; 17 Pick. 404, 28 Am. Dec. 309; 2 Dallas, 142; *Strong v. White*, 19 Conn. 238.

<sup>2</sup> *Lorton v. Woodward*, 5 Del. Ch. 505; *Bishop v. McClelland*, 44 N. J. Eq. 450, 16 A. 1. Especially if the will makes no gift over. *Given v. Hilton*, 95 U. S. 591, 24 L. Ed. 458. See also *McCune v. Baker*, 155 Penn. St. 503, 26 A. 658; *Mannox v. Greener*, L. R. 14 Eq. 456; *Emery v. Wason*, 107 Mass. 507; 3 Ohio St. 369; 52 N. Y. 359.

<sup>3</sup> *Hopkins v. Keazer*, 89 Me. 347, 36 A. 615. Cf. 503; 118 Tenn. 325, 99 S. W. 988 ("income" limited); *Wynn v. Bartlett*, 167 Mass. 292, 45 N. E. 752.

<sup>4</sup> *Kendall v. Kendall*, 4 Russ. 370; 1 Jarm. Wills, 751; *Moore v. Moore*, 1 Bro. C. C. 127; *Brooke v. Turner*, 7 Sim. 681; *Penniman v. French*, 17 Pick. 404, 28 Am. Dec. 309.

<sup>5</sup> As to "effects," with context, see 2 M. & S. 448; 15 M. & W. 450; 74 Ga. 124; *Andrews v. Applegate*, 79 N. E. 176, 223 Ill. 535, 12 L. R. A. (N. S.) 661 (land not included); 15 East, 394; *Page v. Foust*, 89 N. C. 447; *Ennis v. Smith*, 14 How. 400,

510. "Estate" or "property" may be said to embrace *prima facie* the whole estate of the testator, both real and personal, and his property of every description.<sup>1</sup>

511. A liberal rule is applied in words and expressions to meet a testator's meaning.<sup>2</sup>

512. Many cases involve the description of particular words denoting property; but the value of the precedents as establishing rules is by no means proportioned to their number.<sup>3</sup>

14 L. Ed. 472; *Hodgson v. Jex*, 3 Ch. D. 122. As to "possessions," see *Blaisdell v. Hight*, 69 Me. 306, 31 Am. Rep. 278; *Clark v. Hyman*, 1 Dev. L. 382.

By "things," as opposed in law to the word "persons," is to be understood whatever may be owned of subjects not human, so that this term is a comprehensive one. *Bouv. Dict.* "Things." See *Popham v. Lady Aylesbury*, *Ambl.* 68.

<sup>1</sup> As to "estate," see 8 Ves. 604; *Hamilton v. Hodsdon*, 6 Moo. P. C. 76; *Hunt v. Hunt*, 4 Gray, 190; *Smith v. Smith*, 17 Gratt. 276; 32 Miss. 107; 1 Pet. 585, 7 L. Ed. 272; *Den v. Drew*, 14 N. J. L. 68; *Jackson v. Delancy*, 11 Johns. 365; *Given v. Hilton*, 5 Otto, 591, 24 L. Ed. 458. As to "property," see 5 Hayw. 104; *Rossetter v. Simmons*, 6 S. & R. 452; *Morris v. Henderson*, 37 Miss. 492; *Browne v. Cogswell*, 5 Allen, 384. And see "all property and effects," in *White v. Keller*, 68 Fed. 796. But for restraining words, see *Brawley v. Collins*, 88 N. C. 605; 1 Dev. L. 382; *Wheeler v. Dunlap*, 13 B. Mon. 291. And see further, 2 Bibb, 407; *Haley v. Gatewood*, 74 Tex. 281, 12 S. W. 25; *Fry v. Shipley*, 94 Tenn. 252, 29 S. W. 6; 8 Gill and J. 436; 6 Johns. 185, 5 Am. Dec. 213; 26 Vt. 280; 2 Jones Eq. 75.

<sup>2</sup> *Ireland v. Parmenter*, 48 Mich. 631; 1 Jarm. Wills, 775; 3 M. & K. 267; *Bassett's Estate*, *Re*, L. R. 14 Eq. 54; "All the rest" in L. R. 11 Eq. 280. And see 11 East, 246; 2 Wms. Exrs. 1079; *Evans v. Crosbie*, 15 Sim. 600; 3 Ired. Eq. 450; *Haw v. Earles*, 15 M. & W. 450.

<sup>3</sup> All such precedents yield to the apparent sense disclosed by the testator in each particular case, and they are especially restrained in gifts not residuary.

As to "household goods," "household furniture," etc., see 2 Wms. Exrs. 1180-1187; 2 Munf. 234; *Ambl.* 611; *Pratt v. Jackson*, 1 Bro. P. C. 222; 3 P. Wms. 334; 3 Ves. 311 (not things consumable); *Dennett v. Hopkinson*, 36 Me. 350; *Ruffin v. Ruffin*, 112 N. C. 102, 16 S. E. 1021; *Gooch v. Gooch*, 33 Me. 535; *Sawyer v. Sawyer*, 28 Vt. 245 (not a watch); 41 N. J. Eq. 93, 3 A. 157; 59 N. H. 242; *Chase v. Stockett*, 72 Md. 235, 240, 19 A. 761 (china and plated ware included). "Wearing apparel" distinguished, 33 Me. 535. And "personal effects," 173 Penn. St. 368, 34 A. 58. And money contained in an article of furniture. *Smith v. Jewett*, 40 N. H. 513; 124 N. Y. 388. As to books, cf. *Ambl.* 611; 3 Ves. 311; *Ouseley v. Anstruther*, 10 Beav. 462; and wills, notes, etc., 84 Me. 170, 24 A. 805; 63 Vt. 236, 22 A. 600. "All the household property in the dwelling-house." *Frazer, Re*, 92 N. Y. 239. "Articles of personal use and ornament." 188 Penn. St. 33, 68 Am. St. Rep. 847, 41 A. 448, 49 L. R. A. 444. And see 51 Conn. 569 ("household effects," etc.); 65 N. Y. S. 358; *Scoville v. Mason*, 57 A. 114, 76 Conn. 459.

As to "stock on farm," "stock in trade," "plantation stock," "plant and good will," passing not articles of domestic enjoyment so much as what aids in carrying on a business pursuit, see 3 Atk. 64; 9 M. & W. 23; 4 Jones Eq. 203; 19 Tex. 553; 36 S. E. 377; 58 Md. 575; *Baker v. Baker*, 51 Wis. 538, 8 N. W. 289; *Kempf's Appeal*, 53 Mich. 352, 19 N. W. 31. See *Prater, Re*, 37 Ch. D. 481 ("property at my bank"). And see further, *Northup's Will*, 87 N. Y. S. 318 ("law business, books," etc.); 79 N. E. 269, 193 Mass. 271 (factory products).

As to life insurance policy, see *Blouin v. Phaneuf*, 81 Me. 176, 16 A. 540; 76 Tex. 293, 13 S. W. 312; 86 Me. 120, 29 A. 976; *Aveling v. Association*, 72 Mich. 7, 1 L. R. A. 528, 40 N. W. 28; 83 Me. 295, 22 A. 173. The word "etc." 152 Mass. 353.

As to bond having coupons, see *Ogden v. Pattee*, 149 Mass. 82, 14 Am. St. Rep. 401, 21 N. E. 227; *Sanborn v. Clough*, 64 N. H. 315, 10 A. 678.

As to "debts," see 1 Meriv. 541; 3 Meriv. 434; 11 Ves. 356.

513. In describing what is given, the terms "devise and bequeath" are often conveniently associated. And, in furtherance of a testator's intent, the words "bequeath" and "devise" may in any will be treated as synonymous, if the context requires it;<sup>1</sup> and the words "devise," "legacy," and "bequest" may be applied indifferently to real or personal property.<sup>2</sup>

514. A general and comprehensive term may be restrained in sense to less than its natural import in a given case by the context and associated words under the will. For it is a rule of presumption, especially in clauses not residuary, that where a more general description is coupled with an enumeration of things, the description shall cover only things of the same kind;<sup>3</sup> and doubtless words of general description may by due regard to the context be considered as limited by an attempt at particular description.<sup>4</sup>

As to a bond, note, etc., bearing interest, see *Perry v. Maxwell*, 2 Dev. Eq. 448; 2 Keen, 274; 13 C. B. 205; 2 Atk. 112; 4 Russ. 34.

As to points of compass, see *Weare v. Weare*, 59 N. H. 293; 71 Me. 596.

A bequest of "wearing apparel," etc., "contained in eight trunks." 30 How. Pr. 265. "Corn, fodder, meat, and other provisions on hand." *Mooney v. Evans*, 6 Ired. Eq. 363. And see *Searle v. Fieles*, 83 N. E. 901, 197 Mass. 343. "Books and papers." 82 P. 549. "Pecuniary investment." (1905) 2 Ch. 55. "Bank stock." *Clark v. Atkins*, 90 N. C. 629, 47 Am. Rep. 538; 113 N. W. 398, 133 Wis. 43; *Tomlinson v. Bury*, 145 Mass. 346, 1 Am. St. Rep. 464, 14 N. E. 137. As to "shares," see 37 Ch. D. 683. And see *Capehart v. Burrus*, 122 N. C. 119, 29 S. E. 97.

Gift of a receptacle "and its contents." *Magoohan's Appeal*, 117 Penn. St. 238, 2 Am. St. Rep. 660, 14 A. 816; *Robson, Re*, 2 Ch. (1891) 559; 159 Mass. 594, 38 Am. St. Rep. 465, 22 L. R. A. 153, 35 N. E. 94 (no devise of land).

As to "amount," see *Garth v. Garth*, 139 Mo. 456, 41 S. W. 238; 27 So. 705, 52 La. Ann. 1122. "Judge of probate." *Allen's Appeal*, 69 Conn. 702, 38 A. 701.

See further, *Wolf v. Schoeffner*, 51 Wis. 53, 8 N. W. 8; *Edmondson v. Bloomshire*, 11 Wall. 382, 20 L. ed. 44; *Partner v. Loan Co.*, 71 N. E. 894, 163 Ind. 303 (stock at its par value); *Mortimer v. Potter*, 72 N. E. 817, 213 Ill. 178; 57 A. 114, 76 Conn. 459 (scrip, stock etc.); *Drake v. True*, 56 A. 749, 72 N. H. 322; 87 S. W. 93, 112 Mo. App. 332; *Wheeler, Re*, (1904) 2 Ch. 66 ("ready money"). Personal property may be aided in description by location. *Clarke, Re*, (1904) 1 Ch. 294; *Blackmer v. Blackmer*, 63 Vt. 236, 22 A. 600.

<sup>1</sup> *Dow v. Dow*, 36 Me. 211; *Brown v. Taylor*, 1 Burr, 268; *Thompson v. Gaut*, 14 Lea, 310.

<sup>2</sup> *Ladd v. Harvey*, 21 N. H. 514; 15 Sim. 600; 23 Geo. 571. Where, however, the testator uses words in their technical sense that sense must prevail. *Hazelrig v. Hazelrig*, 3 Dana, 48. See 171 Mass. 84, 50 N. E. 512; 170 Penn. St. 177, 32 A. 636.

A bequest broadly expressed of all one's animals should include such as were bailed to other persons. 84 Me. 185, 24 A. 811. This is a rule of general application to personal property of any kind.

<sup>3</sup> *Given v. Hilton*, 5 Otto, 591, 24 L. Ed. 458.

<sup>4</sup> *Allen v. White*, 97 Mass. 504; *Urich's Appeal*, 86 Penn. St. 386, 27 Am. Rep. 707; 124 Mass. 111; *Freeman v. Coit*, 96 N. Y. 63; *supra*, 475; 30 Ch. D. 92. Thus a bequest ending "and everything the house contains" may be restrained in effect by prior words detailing the kind of things. *Webster v. Weirs*, 51 Conn. 569. And see *Cook v. Oakley*, 1 P. Wms. 302; 2 Atk. 103; 3 Atk. 103; *Peaslee v. Fletcher*, 60 Vt. 188, 14 A. 1. See also 13 Ves. 39; *Richardson v. Hall*, 124 Mass. 228; 1 Johns. Ch. 329; 3 Beav. 521; 1 Jarm. Wills, 753, 754. Where "etc." follows words of particular description, things *eiusdem generis* is meant. 26 Beav. 220; *Barnaby v. Tassell*, L.

But this rule of restraining a more general description by the context and by associated words of narrower import is after all but a rule of presumption; it yields to the testator's intent as gathered from the whole instrument.<sup>1</sup>

515. **The avoidance of partial intestacy as an alternative** favors the more comprehensive construction where such general and particular expressions are found together.<sup>2</sup>

516. **A false description does not injure** is a familiar maxim of the civil law;<sup>3</sup> and where the description is made up in part of what is true and in part of what is false, the untrue part will be rejected as not vitiating the devise, if the part which is true describes the subject with sufficient certainty.<sup>4</sup> This maxim must be taken in furtherance of a testator's intention and not to subvert it.<sup>5</sup>

517. **But where there is a clear enumeration of particulars** which purport on their face to be designed as qualifications of a preceding

R. 11 Eq. 363; *Woodcock v. Woodcock*, 152 Mass. 353, 25 N. E. 612. As to corporeals only, see *Benton v. Benton*, 63 N. H. 289, 56 Am. Rep. 512; *Reynolds, Re*, 124 N. Y. 388.

<sup>1</sup> 1 Jarm. Wills, 755-758; Bro. C. C. 29; 1 Russ. 276; 124 Mass. 111; 86 Penn. St. 386, 27 Am. Rep. 707; *supra*, 475; 5 Otto, 591, 24 L. Ed. 458; *Chapman v. Chapman*, 4 Ch. D. 800. See *Hodgson v. Jex*, 2 Ch. D. 122 (mere enumeration); *Taubenhan v. Dunz*, 125 Ill. 524, 17 N. E. 456; 64 Tex. 22; 75 Cal. 189, 16 P. 774 ("ornaments"). As to a defective "viz." see L. R. 3 Eq. 717; *King v. George*, 5 Ch. D. 627. As to misdescription, see *Martin v. Smith*, 124 Mass. 111; *Freeman v. Coit*, 96 N. Y. 63; *Garth v. Garth*, 139 Mo. 456, 41 S. W. 238. As to the word "including," meaning a part, see *Henry v. Henry*, 81 Ky. 342; *Pepper's Estate*, 154 Penn. St. 340, 25 A. 1063.

<sup>2</sup> 3 P. Wms. 112; 2 D. & Wa. 59; 1 Jarm. Wills, 761; *Reynolds, Re*, 124 N. Y. 388, 26 N. E. 954; 190 N. Y. 128, 82 N. E. 1093. See as to reference in aid of such description, 103 N. Y. 167, 8 N. E. 506; *Thomas v. Thomas*, 82 N. E. 236, 292 Ill. 277.

<sup>3</sup> *Falsa demonstratio non nocet cum de corpore constat*.

<sup>4</sup> 1 Jarm. Wills, 785; *Morrell v. Fisher*, 4 Ex. 591.

<sup>5</sup> For instance, where one plainly identifies the premises devised by him, and yet calls them "freehold" when in fact they are "leasehold," or *vice versa*, or describes the house as tenanted by A when it was tenanted by B, or purchased of A when it was purchased of B; or mentions the farm he gives by will as consisting of about 130 acres when it was much larger or much smaller; in these and similar instances the plain identification in the main of what is devised carries the property, if just, and the subordinate misdescription which is superadded may be thrown out in construction as surplusage. L. R. 6 Eq. 422; *Whitefield v. Langdale*, 1 Ch. D. 61; 10 Cush. 155; *Bear v. Bear*, 13 Penn. St. 529; 99 S. W. 1093, 201 Mo. 360; *Ehrman v. Hoskins*, 67 Miss. 192, 19 Am. St. Rep. 297; *Emmert v. Hays*, 89 Ill. 11; 8 Or. 303, 34 Am. Rep. 581; *Wales v. Templeton*, 83 Mich. 177, 47 N. W. 238. Cf. 44 Mich. 100, 6 N. W. 218. In fact, wherever it is clear that the testator intended to pass specific property by his will, it will pass notwithstanding a misdescription of the property, so long as there is enough correspondence to afford the means of identifying the subject of the gift. 4 Sandf. 579; *Huffman v. Young*, 170 Ill. 290, 49 N. E. 570.

A gift by words of general description, we have seen, is not to be limited by a subsequent attempt at particular description. *Supra*, 475, 514. See *Martin v. Smith*, 124 Mass. 111. Cf. L. R. 16 Eq. 177; 1 M. & Sel. 299; 7 Taunt. 343; *Drew v. Drew*, 28 N. H. 489; *Stewart v. Stewart*, 96 Iowa, 620, 65 N. W. 976. On the other hand, a particular misdescription cannot enlarge the premises whose general description identifies it plainly. 4 M. & S. 550; 1 Jarm. Wills, 786-789.

general description, words of general devise must yield, and the foregoing maxim does not apply;<sup>1</sup> but rather the maxim, *ex præcedentibus et consequentibus optima fiat interpretatio*.<sup>2</sup>

518. In case of a discrepancy between two modes of description, that mode will be followed which is the less liable to mistake.<sup>3</sup> But where the will clearly purports to give that which the testator has not, the court refuses to subvert its language; nor will evidence from without be admitted to show that what is not ambiguously expressed meant other than it purports.<sup>4</sup>

518a. Real estate with the personalty thereon is sometimes considered.<sup>5</sup>

519. A residuary bequest of personal property operates upon all the personal estate which the testator may have at his death, and *prima facie* carries with it not only whatever remains undisposed of by his will, but whatever despite the will fails of disposition in the event from one cause or another.<sup>6</sup> Nevertheless, this presumption is liable in any case to be rebutted; and where the will shows that the testator meant that the residuary gift should take only a limited effect, that meaning must operate.<sup>7</sup>

<sup>1</sup> *Griscom v. Evens*, 40 N. J. L. 402; *Drew v. Drew*, 28 N. H. 489.

<sup>2</sup> From what precedes and what follows, we must gather the best interpretation. And see 514. And hence of two adjoining parcels it may appear that only one was given. 40 N. J. L. 402; *Evens v. Griscom*, 42 N. J. L. 579.

Where a devise gives the area and also describes by bounds, it is the latter description which controls. *Lyon v. Lyon*, 96 N. C. 439, 2 S. E. 41. And as to a plan on public record, see *Finelite v. Sinnott*, 125 N. Y. 683, 25 N. E. 1089. And see 115 N. Y. 290, 22 N. E. 219.

<sup>3</sup> 8 T. R. 579; 4 M. & S. 550; *Morrell v. Fisher*, 4 Ex. 591; *Redding v. Allen*, 3 Jones Eq. 358.

<sup>4</sup> 8 Bing. 244; 1 Jarm. Wills, 795; *Sturgis v. Work*, 122 Ind. 134, 17 Am. St. Rep. 345, 22 N. E. 996. But erroneous particulars may be stricken out. *Moreland v. Brady*, 8 Or. 303, 34 Am. Rep. 581. See also *Black v. Richards*, 95 Ind. 184; 228 Ill. 23, 81 N. E. 787, 119 Am. St. Rep. 409; 105 Ill. 361; 68 Iowa, 656, 27 N. W. 811; *Christy v. Badger*, 71 Iowa, 581, 32 N. W. 513; *Bowen v. Allen*, 113 Ill. 53, 55 Am. Rep. 398. Cf. 113 Ill. 327, 55 Am. Rep. 422; 45 Wis. 357, 30 Am. Rep. 757; *Ehle's Will*, 73 Wis. 445, 41 N. W. 627. As to admitting extrinsic evidence of the testator's intent where the description was partly right, cf. 573, 574, *et seq.* If, on the whole, real estate be devised, the description of which it is impossible to ascertain, the devise must fail. *Edens v. Miller*, 147 Ind. 208, 211, 46 N. E. 526, and cases cited; 59 N. E. 166, 189 Ill. 500.

<sup>5</sup> *Martin v. Osborne*, 85 Tenn. 420, 3 S. W. 647; *Dana v. Burke*, 62 N. H. 627 (fixtures); *Reynolds, Re*, 124 N. Y. 388, 26 N. E. 954.

<sup>6</sup> It includes in consequence both lapsed and void legacies, those which turn out void, and those which fail by the death of the legatee while the testator was alive. 8 Ves. 25; 2 Ves. 285; *Tindall v. Tindall*, 23 N. J. Eq. 244; *Leake v. Robinson*, 2 Me. 392; *Risk's Appeal*, 110 Penn. St. 171, 1 A. 85; *Drew v. Wakefield*, 54 Me. 296; *Firth v. Denny*, 2 Allen, 471; 3 Whart. 480; 4 Barb. 90. And see 2 Coll. 516; 10 Bea v. 276; 1 Jarm. Wills, 762; Exrs. *post*, pt. 5, c. 4.

<sup>7</sup> Gift of residue may be restricted by the context, or by provisions inconsistent with a more liberal construction. 3 P. Wms. 40; *Amb. 577*; *Kay*, 507; 45 Minn. 48; *De G. & J.* 496; *Baker's Appeal*, 115 Penn. St. 590, 8 A. 630. And see as to residue

520. **Where a general bequest is made of chattels of a particular description**,—as of all one's mortgages, or stocks, or moneys in bank,—the bequest will carry whatever chattels of that description the testator leaves at his death, whether less or more than he might have expected to leave when the will was made.<sup>1</sup> And by analogy, the general bequest of residue answering to this particular description will embrace all of that kind whose disposition has failed in the event from any cause.<sup>2</sup>

521. **As for a residuary or general devise of real estate**, the rule has not corresponded in construction to that of the residuary bequest; first, because of the old rule as to after-acquired land, and next because of favor to the heir-at-law.<sup>3</sup> But under the statute policy, which applies to wills made within the last half-century or thereabouts, the analogies of legacies and devises fairly harmonize in construction, so far as residuary gifts are concerned.<sup>4</sup>

522. **A devise of "all the residue" of the testator's property or of his estate** is presumed to pass real as well as personal property;<sup>5</sup> meaning by "residue" whatever surplus may be left after all liabilities of the estate are discharged and the other specific purposes of the will carried into effect.<sup>6</sup>

which fails, L. R. 4 Eq. 202; *Skipwith v. Caball*, 19 Gratt. 786; 1 Sw. 566; *Humble v. Shore*, 7 Hare, 247. As to legatees with residue also to them, see *Lombard v. Boyden*, 5 Allen, 251; 10 S. & R. 353. And see 1 Sw. 566; *White v. Fisk*, 22 Conn. 35; 23 N. Y. 312, 80 Am. Dec. 269; 110 Penn. St. 171, 1 A. 85.

<sup>1</sup> *Page v. Young*, L. R. 19 Eq. 501.

<sup>2</sup> 21 Beav. 564; 519 *supra*. But cf. L. R. 2 Eq. 276; *Easum v. Appleford*, 5 My. & Cr. 56; *Baker v. Farmer*, L. R. 3 Ch. 537; 11 Ch. D. 949. The testator's intent as shown in the whole will solves all such questions, and dispenses with abstruse maxims under this head.

Whether the word "residue" or the residuary gift, however expressed, comprises the general personal estate or is confined by the context to such portion of a particular fund already dealt with as remains undisposed of, is to be considered. 1 Jarm. Wills, 767; 3 M. & Cr. 661; *Jull v. Jacobs*, 3 Ch. D. 703; *Burnside's Succession*, 35 La. An. 708; *Pierce v. Stidworthy*, 79 Me. 234, 9 A. 617 (claim upon the government); *Addeman v. Rice*, 19 R. I. 30, 31 A. 429.

<sup>3</sup> *Supra*, 29, 479; 1 Jarm. Wills, 645, 646; 8 Mod. 123; *Prescott v. Prescott*, 7 Met. 141; *Tongue v. Nutwell*, 13 Md. 415. See also 1 Harring. 528.

<sup>4</sup> Stat. 1 Vict. c. 26, §§ 3, 24, 25; *Thayer v. Wellington*, 9 Allen, 284, 85 Am. Dec. 753; *Deford v. Deford*, 36 Md. 168; 88 Penn. St. 470; 1 Jarm. Wills, 646, 651; *Drew v. Wakefield*, 54 Me. 296; 7 Hill (N. Y.) 348; 18 R. I. 62, 19 L. R. A. 413, 25 A. 840; *Springett v. Jennings*, L. R. 10 Eq. 488; *ib.* 6 Ch. 333; 140 Penn. St. 325, 21 A. 398; 56 A. 656, 98 Me. 167; *Davis v. Davis*, 57 N. E. 317, 62 Ohio St. 411, 78 Am. St. Rep. 725; *Rickman v. Meier*, 72 N. E. 1121, 213 Ill. 507.

<sup>5</sup> *Faust v. Birner*, 30 Mo. 414; 2 Desaus. 573; *Molineaux v. Reynolds*, 55 N. J. Eq. 187, 36 A. 276; 113 N. Y. 337, 21 N. E. 64; *Smith v. Smith*, 141 N. Y. 29, 35 N. E. 1075.

<sup>6</sup> 43 N. J. Eq. 659, 12 A. 204; 45 Minn. 48, 47 N. W. 308. And so with kindred expressions. 2 Jones Eq. 215; 2 Desaus. 422; *Smith v. Smith*, 17 Gratt. 268 ("rest and residue," etc.); *Atkins v. Kron*, 2 Ired. Eq. 58; *Wynne v. Wynne*, 23 Miss. 251, 57 Am. Dec. 139. "Balance of my estate" is exhaustive, carrying both real and per-



523. **The intermediate income undisposed of but accumulating** is carried in a general residuary bequest, even though contingent in terms;<sup>1</sup> or at all events until the law against long accumulation stops it and turns the stream to the next of kin.<sup>2</sup> On the other hand, such devises of real estate do not carry the intermediate rents and profits prior to the period of vesting.<sup>3</sup> But if the testator's residuary real and personal estate are blended in one gift, though contingent and future in terms, the will applicable to personalty is presumed to have been intended for both, and intermediate rents and profits of real estate are carried as well as the income of the personal estate.<sup>4</sup>

524. **A residuary bequest or devise as to gift of proceeds of sale, or of reversionary interests, is considered.**<sup>5</sup>

525. **Concerning devises or bequests operating by way of appointment or in execution of some power which is vested in the testator, the earlier rule of construction has been that devises and bequests *prima facie* do not include such property.**<sup>6</sup>

sonal estate. *Grimes v. Smith*, 70 Tex. 217; *Wynne v. Wynne*, 23 Miss. 251, 57 Am. Dec. 139 (exclusive terms make clearer). See *Parker v. Parker*, 5 Met. 134 (fee passes without words of limitation or inheritance); 72 N. E. 1121, 213 Ill. 507; *Haug v. Schumacher*, 60 N. E. 245, 106 N. Y. 506. Cf. *Robertson v. Johnston*, 24 Ga. 102 ("what may remain"); *Farish v. Cook*, 78 Mo. 212, 47 Am. Rep. 107; 31 N. J. Eq. 560.

In various instances words and expressions quite informal have been given this effect, out of regard to the testator's obvious intention. *L. R. 14 Eq. 54*; *Wynne v. Wynne*, *supra*; *Morton v. Woodbury*, 153 N. Y. 243, 47 N. E. 283. While the residuary clause in a will is usually the last of its disposing provisions, still, the fact that it is not the last is not of controlling consequence as against the true intent to be gathered from the whole will. 140 Penn. St. 268, 23 Am. Rep. 230, 11 L. R. A. 767, 21 A. 318 ("money"); *Morton v. Woodbury*, 153 N. Y. 243, 47 N. E. 283. But cf. *Markle's Estate*, 187 Penn. St. 639, 41 A. 304.

<sup>1</sup> 5 Ves. 430; 2 Ark. 472; 1 Jarm. Wills, 652; 1 Wash. 53, 22 Am. St. Rep. 136; 3 Call, 75; *Cochrane v. Schell*, 140 N. Y. 516, 35 N. E. 971.

<sup>2</sup> *Wade-Gery v. Handley*, 1 Ch. D. 653; 3 ib. 374; *Bective v. Hodgson*, 10 H. L. 656 (even though personalty is to be laid out in lands). But cf. *Wyndham v. Wyndham*, 3 Bro. C. C. 58; 4 ib. 144; *Howell's Estate*, 180 Penn. St. 515, 37 A. 181.

<sup>3</sup> *Jac. 468*; *Hopkins v. Hopkins*, Ca. t. Talb. 44; 1 Atk. 580 (where it is reported imperfectly); 1 Jarm. Wills, 652.

<sup>4</sup> *Jac. 468*; *Ackers v. Phipps*, 3 Cl. & F. 691; 4 Johns. Ch. 397; 140 N. Y. 516, 35 N. E. 971; 1 H. & M. 397. A residuary clause plainly expressed as to income will control in any case. *Duffield v. Duffield*, 3 Bli. N. S. 621. As to land specifically devised and rents accrued at testator's death, see *Parker v. Chestnutt*, 80 Ga. 12. See further, *Weatherall v. Thornburgh*, 8 Ch. D. 261; *L. R. 20 Eq. 255*.

<sup>5</sup> See as to gift of proceeds, 1 Ves. Sen. 320; *Hephinstall v. Gott*, 2 J. & H. 450; 1 V. & B. 410; *Beirne v. Beirne*, 33 W. Va. 663, 11 S. E. 46. As to reversion, etc., see 1 Jarm. Wills, 654-663; *Church v. Mundy*, 12 Ves. 426; 50 S. E. 597, 138 N. C. 115; 10 Pick. 306; *Brattle Square Church v. Grant*, 5 Gray, 142, 66 Am. Dec. 356; 3 Bradf. (N. Y.) 73; *Youngs v. Youngs*, 45 N. Y. 258; 3 Watts, 473, 27 Am. Dec. 367; *Woodman v. Woodman*, 89 Me. 128, 35 A. 1037; 30 Conn. 301. See *Davies, Re*, (1892) 3 Ch. 63 (proceeds of policy of insurance).

<sup>6</sup> 6 Co. 17 b; *Andrews v. Emmot*, 2 Bro. C. C. 297; 2 Sim. 95; 1 Jarm. Wills, 676-682; 1 Atk. 559. But cf. 6 Bing. 475; 7 M. & Gr. 1047.

526. But modern legislation largely shifts the presumption; and the inclination now appears to regard a general devise or bequest as operating *prima facie* in execution of whatever general power of disposal may be vested in the testator.<sup>1</sup>

527. Moulding of language in order to further a testator's obvious intention is preserved within prudent limits where a misdescription of what is given appears.<sup>2</sup>

528. Next, to consider the person or persons who may be the object of the gift. Of personal incapacity to take under a will we have already discoursed in general.<sup>3</sup>

529. Gift to children, etc., of a given class, we first consider. Our law, instead of supposing that a gift to objects thus brought together, should include naturally all of that class who may fulfil the description at any time, presumes rather that the testator intended the class to be ascertained upon his death, and neither earlier nor later.<sup>4</sup>

<sup>1</sup> See Stat. 1 Vict. c. 26, § 27; 24 Beav. 403; Wilkinson, *Re*, L. R. 4 Ch. 588; Boyes v. Cook, 14 Ch. D. 52; Amory v. Meredith, 7 Allen, 397; White v. Hicks, 33 N. Y. 383; 1 Bradf. (N. Y.) 114; Andrews v. Brumfield, 32 Miss. 108; Kimball v. Bible Society, 65 N. H. 139, 23 A. 83, 85; 1 Story 426. The avowal in the will of an intent to execute a power is itself an execution of it without any express declaration. Blake v. Hawkins, 8 Otto, 315, 25 L. Ed. 139. And see Harvard College v. Balch, 171 Ill. 275; Boyes v. Cook, 14 Ch. D. 52; Funk v. Eggleston, 92 Ill. 515, 34 Am. Rep. 136. Power to "dispose of" includes power to mortgage. 95 S. W. 875, 197 Mo. 550. Naked power of disposition without beneficial interest, in 70 N. E. 368, 162 Ind. 353.

<sup>2</sup> *Supra*, 477, 516; Baird v. Boucher, 60 Miss. 326 ("rent" read as "real"); Northern's Estate, *Re*, 28 Ch. D. 153. But cf. Graham v. Graham, 23 W. Va. 36, 48 Am. Rep. 364.

<sup>3</sup> *Supra*, 23-27.

<sup>4</sup> Viner v. Francis, 2 Cox, 190; Kay, 638; 55 S. E. 946, 126 Ga. 729; 4 Paige, 47; Downing v. Marshall, 23 N. Y. 373, 80 Am. Dec. 290; Worcester v. Worcester, 101 Mass. 132; 2 Jarm. Wills, 154, 156. This rule extends to grandchildren, issue, brothers, nephews, and cousins. *Ib.*; 3 D. M. & G. 649; 3 McCord Ch. 214; State v. Raughley, 1 Houst. 561; Smith v. Ashurst, 34 Ala. 210; 166 Mass. 241, 44 N. E. 132; 146 Mass. 345, 15 N. E. 660; 563. Nor is such presumption to be varied, whether an aggregate sum, like \$5,000, be given to the class,—as \$5,000, to the children (or grandchildren, or brothers, etc.) of A,—or a certain sum to each member of the class, as to the children (or grandchildren, or brothers, etc.) of A, \$1,000 each. *Ib.* See also Chasmar v. Bucken, 37 N. J. Eq. 415; Robinson v. McDiarmid, 87 N. C. 455; 19 Barb. 494 (no lapse by death earlier). As to words of additional description, see Leigh v. Leigh, 17 Beav. 605. And see 4 Hare, 250; 8 Ves. 375. But intention takes effect. 11 Sim. 397; Williams v. Neff, 52 Penn. St. 333; Morse v. Mason, 11 Allen, 36; L. R. 8 Eq. 52; 56 N. E. 831, 176 Mass. 7; Starling v. Price, 16 Ohio St. 32; Smith's Trusts, *Re*, 9 Ch. D. 117; 1 Beav. 154. See Locke v. Dunlop, 39 Ch. D. 387.

Ordinarily a devise or bequest to sons by name is not a gift to a class. Church v. Church, 15 R. I. 138, 23 A. 302. But cf. Springer v. Congleton, 30 Ga. 977.

In short, the disposition is to regard all testamentary gifts to members of a class consisting of children, grandchildren, issue, brothers, nephews, or cousins, as intending *prima facie* that class as it may exist at the testator's death, whether the effect be to reduce or to extend the number of individual beneficiaries entitled to the fund. Gift to a class is as to tenants in common, not joint tenants. Mitchell v. Mitchell, 47 A. 325, 73 Conn. 303.

530. Yet the judicial disposition is to let in subsequent issue or near relations of a class as generously as possible where the terms of the will justify a distinction. That distinction is found when the aggregate fund to the class is not distributable at once, and the question who shall compose the class may conveniently be postponed; or, in general, where the total amount of the gift does not depend upon the number of participants admitted to share it.<sup>1</sup>

531. Another rule of presumption in this connection is, that where an aggregate fund is given to children as a class, and the share of each child is made payable on attaining a given age, or on marriage, the period of distribution is the time when the first child takes his share, and those born later are excluded;<sup>2</sup> and the same holds good apparently of gifts to grandchildren, or to near relatives of the other classes already considered.<sup>3</sup>

<sup>1</sup> Hence the devise or bequest of a corpus or aggregate fund to children as a class, where the gift is not immediate, vests in all the children in existence at the testator's death, but so as to open and let in children who may come into existence afterwards at any time before the fund is distributable. *Devisme v. Mello*, 1 Bro. C. C. 537; 10 Hare, 441; 2 Jarm. Wills, 156-167; 1 Cox, 327; 5 R. I. 129; *Hill v. Rockingham Bank*, 46 N. H. 270, 88 Am. Dec. 212; *Hall v. Hall*, 123 Mass. 120; 1 McCart. 167; *Ross v. Drake*, 37 Penn. St. 375; 143 Mass. 237, 9 N. E. 625; 103 N. Y. 453, 57 Am. Rep. 760, 9 N. E. 241; 72 Md. 67, 19 A. 146; *Tayloe v. Mosher*, 29 Md. 445; 37 Miss. 65; *Cooper v. Hepburn*, 15 Gratt. 558; 38 Ill. 206. See *Burrows, Re*, (1895) 2 Ch. 49; 109 N. C. 675, 14 S. E. 74 (child already conceived). And this rule of construction, like the former one, extends its favor to grandchildren, issue, brothers, nephews, and cousins. *Baldwin v. Rogers*, 3 D. M. & G. 649. All limitations future in enjoyment and not immediate appear to come within scope of this maxim. The rule of the text applies to gifts in the nature of powers or disposing of a reversionary interest expectant, or in execution of powers. 8 Ves. 375; 2 Jarm. 157, note. It applies to estates given for life and then over to the class. It applies where the prior estate determines by bankruptcy. L. R. 16 Eq. 590.

But this enlarged rule of construction does not operate where the postponement of distribution is that merely which the law fixes for convenience in paying debts, and winding up an estate in the usual process of settlement. *Hagger v. Payne*, 23 Beav. 479; 2 Strobh. Eq. 1; 100 N. Y. S. 487. Nor where the aggregate gift is necessarily increased by the number of participants, instead of being a fund whose total amount is to be shared among more or fewer individuals of a class. *Ringrose v. Bramham*, 2 Cox, 384. Nor to speak generally, when such a rule would not consist with a fair and just interpretation of the particular will.

<sup>2</sup> 2 Jarm. Wills, 160; 3 Bro. C. C. 403; 3 K. & J. 48; 10 Ves. 152; *Hubbard v. Lloyd*, 6 Cush. 523, 53 Am. Dec. 55; *Tucker v. Bishop*, 16 N. Y. 404; 2 Rawle, 275, 21 Am. Dec. 445; 5 Jones Eq. 44, 208; *Dawson v. Oliver-Massey*, 2 Ch. D. 753.

<sup>3</sup> *Iredell v. Iredell*, 25 Beav. 485. See L. R. 12 Eq. 431. Where one attains age, etc., in testator's lifetime, all after-born are usually excluded. *Picken v. Matthews*, 10 Ch. D. 264. This is a rule which supplies but does not conflict with our former maxims; the difference being that there we supposed all shares payable at one and the same period of distribution, whether postponed or immediate, while here they become payable at different times; and the question is, who besides those living at the testator's death shall be embraced under the gift. This rule of presumption seems to apply wherever the share of each one of the class is made to depend upon some event or alternative personal to the individual. But intent prevails still. And should any one of the class attain the age in the testator's lifetime no after-born child is let in at all. 8 Hare, 44; 3 D. M. G. 366; *Armitage v. Williams*, 27 Beav. 346; *Picken v. Matthews*, 10 Ch. D. 264. See 56 N. J. Eq. 507, 39 A. 368; 2 Jarm. Wills, 162-167.

532. A disposition is frequently shown to let in after-born children, wherever "children" are to be ascertained at a given period under any of the foregoing rules of construction, especially a child then *en ventre* and born afterwards.<sup>1</sup> Under a parent's will, all one's own children, present-born or posthumous, may well be presumed, in American policy, as included.<sup>2</sup> Any gift to a class where enjoyment is postponed presumably includes only those who are in existence at the time the enjoyment is to take effect.<sup>3</sup>

533. Of "children," we may observe that the popular and legal senses of the word are in accord. A gift to the "children" of a person means, therefore, presumably, one's immediate offspring, and does not extend to "grandchildren";<sup>4</sup> while "grandchildren," in like manner, is confined to the immediate offspring of offspring, and does not embrace "great-grandchildren."<sup>5</sup>

534. By "children," whether of the testator or some other person, a will is generally understood to denote all of the blood offspring, those of the whole or half blood, whether by one marriage or another.<sup>6</sup> But children by affinity, such as a son's widow, are

<sup>1</sup> 8 Post. 459; 3 Jones Eq. 491; *Butterfield v. Haskins*, 33 Me. 392. The practical inconvenience of postponing a distribution is avoided by taking refunding bonds from the existing distributees. See also 1 S. & Stu. 181; 2 H. Bl. 399; *Archer v. Jacobs*, 101 N. W. 195, 125 Iowa, 467; *Wetherill's Estate*, 63 A. 406, 214 Penn. 150; *Crapo v. Price*, 76 N. E. 1043, 190 Mass. 317; 54 A. 1072, 97 Me. 427; 4 Paige, 47; 15 Pick. 258, 26 Am. Dec. 598; 2 Dev. & B. Eq. 308; *Meigs*, 149; 5 S. & R. 38; *Starling v. Price*, 16 Ohio St. 29; *Crook v. Hill*, L. R. 6 H. L. 265. When the testator uses particular language, his intention shall govern, upon a due interpretation of the will. *Emery, Re*, 3 Ch. D. 300.

<sup>2</sup> *Meares v. Meares*, 4 Ired. L. 192; *supra*, 480.

<sup>3</sup> *Brown, Re*, 154 N. Y. 313; *Cavarly's Estate*, 119 Cal. 410, 51 P. 629. Where no children exist at testator's death, after-born children are favored to prevent a lapse. *Amb. 448*; 2 Jarm. Wills, 167. See, as to words of futurity, 1 Beav. 154.

<sup>4</sup> 10 Ves. 195; *Clifford v. Koe*, 5 App. Cas. 447; 3 De G. & J. 252; 3 Wall, jr. 32; *Osgood v. Lovering*, 33 Me. 469; 3 Comst. 540; *Low v. Harmony*, 72 N. Y. 408; 2 McCart. Ch. 198; 19 Gratt. 327; *Turner v. Withers*, 23 Md. 18; *Pugh v. Pugh*, 105 Ind. 552; *Reynolds, Re*, 20 N. J. 429; 66 Vt. 21, 28 A. 319, 44 Am. St. Rep. 817; *Wills v. Foltz*, 61 W. Va. 262, 12 L. R. A. (N. S.) 283; 56 S. E. 473; *Lawrence v. Philipps*, 71 N. E. 541, 186 Mass. 320; *Ruddell v. Wren*, 70 N. E. 751, 208 Ill. 508; *Lyon v. Baker*, 50 S. E. 44, 122 Ga. 189; *Steinmetz's Estate*, 45 A. 663, 194 Penn. 611; *Tiffany v. Emmet*, 53 A. 281, 24 R. I. 411; 86 N. W. 1004, 84 Minn. 161; 44 S. E. 605, 132 N. C. 755.

<sup>5</sup> 3 V. & B. 59; *Hone v. Van Shaick*, 3 Comst. 540; *Dooling v. Hobbs*, 5 Harring. 405. Such rules are but presumptive, however, and they yield of course to a contrary intention as gathered from the context, as where words explanatory or of more extended meaning are joined. *Houghton v. Kendall*, 7 Allen, 72; *Sorver v. Brendt*, 10 Penn. St. 213; 73 Cal. 594, 15 P. 297; *Prowitt v. Rodman*, 37 N. Y. 58; *Hughes v. Hughes*, 12 B. Mon. 115; 5 Binn. 606; *Duv. 334*. In a few American States, an enlarged sense is favored by local legislation (descendants). As to extension to prevent a lapse, see 2 Jarm. Wills, 147; *Smith, Re*, 35 Ch. D. 558; 12 Sim. 123; 10 Ves. 198. And see 3 Giff. 134; 23 Beav. 73; *McMichael v. Pye*, 75 Ga. 189.

<sup>6</sup> *Isaac v. Hughes*, L. R. 9 Eq. 191; 1 J. & H. 389; 6 Ves. 345.

*prima facie* excluded;<sup>1</sup> and so are step-children.<sup>2</sup> Public policy aids the constant interpretation of the courts that a gift to "children" means, on the face of it, to legitimate children only;<sup>3</sup> into which class local legislation, however, may fairly bring those legitimized by the subsequent marriage of their parents.<sup>4</sup> Where illegitimacy results from the parent's honest error in contracting a marriage which turns out void, the status of such children should be tenderly treated in construction, if possible.<sup>5</sup>

535. "Issue" or "descendants" as objects of a gift are considered.<sup>6</sup>

<sup>1</sup> *Hussey v. Berkeley*, 2 Ed. 194.

<sup>2</sup> 3 Barb. Ch. 466, 475; 23 Wend. 513; *Sydnor v. Palmer*, 29 Wis. 226; 108 Mass. 382; 1 Bradf. 252; 145 Penn. St. 637, 23 A. 322.

<sup>3</sup> The rule of the text applies to gifts to "issue" and terms of relationship generally. See 2 East, 530; *Ellis v. Houstoun*, 10 Ch. D. 236; *Schoul. Dom. Rel.* 281; 1 V. & B. 422, 461; *supra*, 481; *Appel v. Byers*, 98 Penn. St. 479; 2 Jarm. Wills, 217; *Kent v. Barker*, 2 Gray, 535; 14 N. J. Eq. 159; 59 A. 731, 100 Md. 230; *Gates v. Seibert* 57 S. W. 1065, 157 Mo. 254, 80 Am. St. Rep. 625 (legitimate or those reputed such).

<sup>4</sup> This is an American and civil modification of the English common law, with its stubborn opposition. *Schoul. Dom. Rel.* 226, 227; *Miller's Appeal*, 52 Penn. St. 113.

<sup>5</sup> See *Elliott v. Elliott*, 117 Ind. 380, 10 Am. St. Rep. 54, 20 N. E. 264; *Cook v. Hill*, L. R. 6 Ch. 311.

As to an adopted child (a novel question), see 54 Penn. St. 304; 88 Penn. St. 346; *Russell v. Russell*, 84 Ala. 48, 3 So. 900. The criterion may be found in the language of the local statutes relative to adoption. See *Schoul. Dom. Rel.* 232. One might perhaps be decided a "child" under the will of the adopting parent more readily than where the gift was from some other testator. *Barnhizel v. Ferrell*, 47 Ind. 335. But see as to "heir of body," *Sewall v. Roberts*, 115 Mass. 262. And see *Ingram v. Southern*, L. R. 7 H. L. 408; *Hartwell v. Tafft*, 19 R. I. 644, 35 A. 882, and cases cited.

But context or surrounding circumstances may defeat, as before, whatever presumption would naturally have arisen; so that under a gift, children may be restrained to those of some particular marriage, on the one hand, and on the other, enlarged so as to include children by affinity, or step-children, or adopted or even illegitimate children; provided the context shows a corresponding intention in terms or leaves the alternative of a gift which never could have had an object. 2 Jarm. Wills, 217; *Drummond v. Leigh*, 30 Ch. D. 110; *Stewart v. Stewart*, 31 N. J. Eq. 398; 2 Mer. 419; 2 R. & My. 336; 1 Sm. & G. 362; 2 Hare, 282. Of illegitimate children, whose stigma is certainly their misfortune, not their fault, whether born of parents who were guilty or innocent, we may add that courts at this day waver somewhat in applying the standard of construction; pitying, oftener than formerly, the lot of the outcast and finding in the local policy, as they often may, some alleviation of the ancient hardships which attached to the bastard. See 2 Jarm. 217; *Schoul. Dom. Rel.* 218; *Drummond v. Leigh*, 30 Ch. D. 110, commenting upon earlier English cases; 1 Ves. & B. 422; 2 Paige, 11; 37 Ch. D. 695; *Crook v. Hill*, 3 Ch. D. 773; L. R. 6 H. L. 265; *Knye v. Moore*, 5 Harr. & J. 10. As to a gift to an illegitimate child or children not yet begotten, cf. *Holt v. Sindrey*, L. R. 7 Eq. 170; 35 Ch. D. 728.

A common description of "children," however, does not, as a rule, let in those who are illegitimate and so reputed, though it should those supposed legitimate. *Durrant v. Friend*, 5 De G. & S. 343; *Hall, Re*, 35 Ch. D. 551. Sometimes the construction favored as to a third person's will, is to recognize illegitimate children born before but none born after the testator's death. *Harrison, Re*, (1894) 1 Ch. 561. See *Dane v. Walker*, 109 Mass. 179. Illegitimate children by modern policy, are peculiarly favored as to inheriting from maternal relatives. *Hayden v. Barrett*, 172 Mass. 472, 70 Am. St. Rep. 295, 52 N. E. 530.

<sup>6</sup> "Issue," as a phrase of law, imports *prima facie* descendants of every degree from the common ancestor, including children and those more remote. 3 Ves. 258; 19

536. Words which denote collateral relatives as objects of a gift are considered.<sup>1</sup>

537. The word "relations" or "relatives" or "family" has a variable meaning.<sup>2</sup>

Md. 197; 2 Jarm. Wills, 101; 17 N. J. Eq. 475; Taylor v. Taylor, 63 Penn. St. 481, 3 Am. Rep. 565; 2 Marsh, 119; Soper v. Brown, 136 N. Y. 244, 32 N. E. 768, 32 Am. St. Rep. 731; Pearce v. Rickard, 18 R. I. 142, 26 A. 38, 49 Am. St. Rep. 755, 19 L. R. A. 472; Hall v. Hall, 140 Mass. 267, 2 N. E. 700; 119 Penn. St. 108, 12 A. 806. See 61 A. 641, 212 Penn. 91 (heirs of the body); Ingles v. McCook, 68 N. J. Eq. 27, 59 A. 630 ("lawful issue"); 69 N. Y. S. 936; Birks, *Re*, (1900) 1 Ch. 417; Evans v. Jones, 2 Coll. 516 (issue "begotten"); 17 N. J. Eq. 475. Other expressions may narrow. 7 Ves. 522; 2 Bradf. 416; Pruett v. Osborne, 11 Sim. 132; 1 Demarest, 217; 74 Penn. St. 173, 15 Am. Rep. 545; King v. Savage, 121 Mass. 303; McPherson v. Snowdon, 19 Md. 197; 152 Penn. St. 18, 25 A. 231; 68 A. 224 (N. J. Eq.). The word "children" may be enlarged to "issue" where the two terms are interchanged in a will. 2 Jarm. Wills, 107; Amb. 555; 5 Munf. 440. See further, 32 Beav. 158; 4 S. C. 76; Palmer v. Dunham, 125 N. Y. 68, 25 N. E. 1081; 173 Ill. 229, 50 N. E. 704; 152 Mass. 67, 9 L. R. A. 211, 25 N. E. 96; 103 N. W. 144, 128 Iowa, 166; 50 S. E. 794, 71 S. C. 175; 63 A. 830, 214 Penn. 362; Chwatal v. Schreiner, 148 N. Y. 683 (confined to "grandchildren"). As to adopted child, cf. 115 Mass. 262; 64 N. H. 407, 14 A. 557. A devise of real estate or a bequest of personalty appears to follow the same rule in this respect. 19 Beav. 417; Cook v. Cook, 2 Vern. 545; King v. Savage, 121 Mass. 303; Wistar v. Scott, 105 Penn. St. 200, 51 Am. Rep. 197.

As for "descendants," this word cannot include any but lineal heirs, without clear indications in the will of a different purpose. Baker v. Baker, 8 Gray, 101; 2 Bradf. 413; Van Beuren v. Dash, 30 N. Y. 393; 1 Bradf. 314. See 25 Ga. 420 (statute). But children, grandchildren and their children to the remotest degree are thus comprehended. Ambl. 397; Bouv. Dict. "Descendants"; 2 Jarm. Wills, 98-100. "Descendants" like "issue" is a very general word, but competent authorities pronounce it less flexible in construction. 11 Ch. D. 873. The word "offspring" is *prima facie* synonymous with "issue." Allen v. Markle, 36 Penn. St. 117; 3 Drew. 7. See 29 Beav. 6, 18.

<sup>1</sup> By "brothers," "sisters," and even "nephews" or "nieces," is *prima facie* meant not those of the whole blood alone, but half-brothers and half-sisters, or children of a half-brother or half-sister, and so with the more remote kindred. Grieves v. Rawley, 10 Hare, 63; 2 Jarm. Wills, 154; 70 N. J. Eq. 10, 62 A. 672; 61 How. N. Y. Pr. 48; 2 Jones Eq. 202; 1 McCord, 406; 2 Yerg. 115; 1 Mad. 45. "Brethren," as a word of common gender, has been held to embrace both brothers and sisters. 1 Rich. Eq. 78. See as to "brothers and sisters," 11 Phila. 144; 137 Mass. 409; L. R. 11 Eq. 366, note. If the intent of the will be clear enough, even illegitimate kindred of a collateral class may be deemed intended. See (1897) 2 Ch. 208; Seale-Hayne v. Jodrell, (1891) A. C. 304.

"Nephew" means in English law the son and "niece" the daughter of a brother or sister; and great-nephews or great-nieces are not embraced by the term. Ambl. 514; Jac. 207; Crook v. Whitley, 7 D. M. G. 490; 2 Yeates, 196; 2 Jarm. Wills, 152; 43 Ch. D. 569. Nor nephew or niece by marriage only. 3 K. & J. 252; Green's Appeal, 42 Penn. St. 30; 39 Ch. D. 614; Root's Estate, 187 Penn. St. 118, 40 A. 818. And see Goddard v. Amory, 147 Mass. 71, 16 N. E. 725; Waring v. Lee, 8 Beav. 247. Such a rule admits of the usual qualifications of intent. 101 N. Y. S. 652; 3 De G. F. & J. 466; Sherratt v. Mountford, L. R. 8 Ch. 928; L. R. 15 Eq. 305; 57 Conn. 24, 17 A. 173.

The word "cousins" may literally comprehend a large number of collateral kindred; for it denotes the son or daughter of the brother or sister of one's father or mother; so that one may have both paternal or maternal cousins of equal degree. For convenience it is presumed that a testamentary gift to "cousins" is meant to include first cousins only, if there be such, and the nearer degree rather than that more remote. 6 D. M. & G. 68; 31 Beav. 305; 2 Jarm. Wills, 152. See also Sanderson v. Bayley, 4 My. & Cr. 56; 2 Bro. C. C. 125; 1 Sim. & Stu. 301; Charge v. Goodyer, 3 Russ. 140.

<sup>2</sup> "Relations" or "relatives" might include kindred to the remotest degree. But for convenience, and in order to prevent a gift from being void for uncertainty, it is

538. That distinction between *per capita* and *per stirpes*, so familiar in the distribution of the estates of decedents, comes now into view.<sup>1</sup> In general, legatees will take *per capita* rather than *per stirpes*, or *vice versa*, where it is clearly apparent what the testator intended.<sup>2</sup>

commonly confined to those equally who would take under the statutes of distribution (or, if a devise, under the statutes of descent), unless the will discloses a plain purpose to the contrary. 1 Bro. C. C. 31; *Drew v. Wakefield*, 54 Me. 291; 197 Mass. 273, 83 N. E. 880; *Varrell v. Wendell*, 20 N. H. 431; 3 Mer. 437; 11 Phila. 85; 8 S. & R. 45. As to "blood relatives," see *Cummings v. Cummings*, 146 Mass. 501, 16 N. E. 401; 105 N. W. 1064, 126 Wis. 660; 1 Taunt. 263; 11 S. & R. 103. See 20 N. H. 431. Blood relatives preferred in sense. *Kimball v. Story*, 108 Mass. 382; 1 Bro. C. C. 31; 3 Bradf. 382; *Cleaver v. Cleaver*, 39 Wis. 96, 20 Am. Rep. 30; *Hibbert v. Hibbert*, L. R. 18 Eq. 504; 83 Me. 197, 13 L. R. A. 37, 22 A. 115. See "near," 2 Ves. Sen. 527; *Handley v. Wrightson*, 60 Md. 198. A gift to "nearest" relatives seems equivalent to next of kin, excluding the right of representation, but perhaps admitting all of the same degree in blood. *Smith v. Campbell*, 19 Ves. 400; *Ennis v. Pentz*, 3 Bradf. 382; *Locke v. Locke*, 45 N. J. Eq. 97, 16 A. 49. And see 19 Ves. 400; 3 Bradf. 382; 2 Jarm. Wills, 122-124; 9 H. L. C. 1.

The term "family" is a flexible one, and may, under different circumstances, mean a man's household, consisting of himself, his wife, children, and servants; it may confine its scope to those living in one domestic establishment, excluding those who live elsewhere, though of the same degree; it may mean wife and children, or children, excluding the wife; or, if one has no wife and children, it may mean his brothers and sisters, or his next of kin; or it may mean the genealogical stock from which he sprung; since all these applications of the word and even others are found in common parlance. *Bradlee v. Andrews*, 137 Mass. 50; *Wood v. Wood*, 63 Conn. 324, 28 A. 520; 1 Keen, 181; 2 Jarm. Wills, 90. See as to including illegitimates L. R. 6 Ch. 597; *supra*, 534; *Jodrell, Re*, 44 Ch. D. 590; aff. App. Cas. (1891) 304. And see 64 N. H. 526, 15 A. 136 (after-born). It refers of course to two or more persons. 55 Conn. 239, 11 A. 36. The description of "family" may sometimes be so vague that the gift will fail altogether, and on the other hand, may be upheld like a gift to "relations." See 10 Gill & J. 159; *Harper v. Phelps*, 21 Conn. 259; L. R. 6 P. C. 381; 9 Ves. 319. See further, 9 Hare, 708; 65 A. 761, 102 Me. 63; 8 Ves. 604; *Heck v. Clippenger*, 5 Penn. St. 388; 3 W. Va. 610; 17 Ves. 255; *White v. Briggs*, 15 Sim. 17; 29 Beav. 657; *Corlass, Re*, 1 Ch. D. 460; *Crosgrove v. Crosgrove*, 69 Conn. 416, 38 A. 219; 63 Conn. 324, 28 A. 520. As to "kindred," see *Tiffany v. Emmet*, 53 A. 281, 24 R. I. 411.

<sup>1</sup> Where all the persons entitled to share stand in the same degree of kin to the decedent, as, for instance, all grandchildren, and claim directly from him in their own right, and not through some intermediate relation, they take *per capita*; that is, in equal shares, or share and share alike. But where they are of different degrees of kindred, as in the case of grandchildren and great-grandchildren, the latter representing the share of some deceased grandchild like A, they take *per stirpes*, or according to the stock they represent. When persons take as individuals they are said to take *per capita*; when by right of representation, *per stirpes*. 3 Ves. 257; Bouv. Dict.; *Guild v. Allen*, 67 A. 855, 21 R. I. 430. One may thus exclude the legal inference of representation by naming the grandchild of a deceased child with children or specified individuals as all to take "share and share alike," or by some similar expression; or he may on the other hand give representation its natural force silently or by saying that such grandchild shall "take his parent's share," "take by right of representation," and the like. The statute policy of the jurisdiction must determine how far the rule *per stirpes* should be carried, when the assent of the testator is to be inferred from the language or the silence of his will. But aided by this policy our courts raise certain presumptions. See *Butler v. Stratton*, 3 Bro. C. C. 367; 2 Jur. N. S. 443; 3 Ves. 257; *Pearce v. Rickard*, 18 R. I. 142, 49 Am. St. Rep. 755, 19 L. R. A. 472, 26 A. 38. But cf. 27 Beav. 86; 32 Beav. 665; 10 Jur. N. S. 53; 2 Jarm. Wills, 100-102. As to personality and realty, see *Hayes v. King*, 37 N. J. Eq. 1. And see *Healy v. Healy*, 70 Conn. 467, 39 A. 793.

<sup>2</sup> See *Verplanck, Re*, 91 N. Y. 439.

539. **Detached words afford no constant test here of what the testator really intended.**<sup>1</sup> Where, however, the gift is to those who would take in case of intestacy, or to "next of kin" in classes, leaving it doubtful what should be their due proportions, it is held in the United States the safer rule to construe "next of kin" in close conformity with the local Statute of Distributions, so as to give representation and the division *per stirpes* its usual effect under the local policy.<sup>2</sup>

540. **Wherever as a class the beneficiaries are individually named, or are designated by their relationship to some ancestor living at the date of a will, whether to the testator or some one else, they share *per capita*, by natural inference, and not *per stirpes*;**<sup>3</sup> and especially if they are all of the same degree.<sup>4</sup>

<sup>1</sup> As to "heirs" or "personal representation," see 14 Allen, 204; Osburn's Appeal, 104 Penn. St. 637; Cook v. Catlin, 25 Conn. 387; Swinburne, *Re*, 16 R. I. 208, 14 A. 850; 2 Jones Eq. 377; 19 Beav. 448. "Heirs or legal representatives" is a flexible expression. See 27 Penn. St. 55; 118 Ill. 403, 9 N. E. 210. But "heirs," etc., favor *per stirpes*, while "personal representatives" favor *per capita* in sense. *Ib.* And see Puryear v. Edmonson, 4 Heisk. 43; Tuttle v. Puitt, 68 N. C. 543; Richards v. Miller, 62 Ill. 417; Allen v. Allen, 13 S. C. 512, 36 Am. Rep. 716; Scott's Estate, 163 Penn. St. 165, 29 A. 877; 143 N. Y. 125, 38 N. E. 104; Stone, *Re*, (1895) 2 Ch. 196. A varying sense is found. King v. Savage, 121 Mass. 303; Lyon v. Acker, 33 Conn. 222; Risk's Appeal, 52 Penn. St. 271, 91 Am. Dec. 156; 16 R. I. 208, 14 A. 850.

<sup>2</sup> King v. Savage, *supra*; Harris's Estate, 74 Penn. St. 452; 11 B. Mon. 34; Fisher v. Skillman, 3 C. E. Green, 236; 12 Bush. 369; Hawkins Wills, 115. Cf. 9 Rich. Eq. 471; 2 Dev. Eq. 306; Walker v. Webster, 95 Va. 377, 28 S. E. 570; Thomas v. Miller, 161 Ill. 60, 43 N. E. 848. A division "equally between" instead of "equally among" imports a *per stirpes* division. 162 Penn. St. 369, 29 A. 739. Cf. 135 Ind. 278, 34 N. E. 991; 63 Conn. 377, 28 A. 524; 161 Mass. 29, 36 N. E. 582. Intent, after all, controls. 107 Iowa, 636; 20 R. I. 408, 78 N. W. 673, 39 A. 750.

<sup>3</sup> 2 Vern. 705; 10 Ves. 116; Luzar v. Harman, 1 Cox, 250; Farmer v. Kimball, 46 N. H. 435, 88 Am. Dec. 219; Hill v. Bowers, 130 Mass. 135; Thompson v. Young, 25 Md. 461; Post v. Herbert, 27 N. J. Eq. 540; 83 Penn. St. 59; Hoxton v. Griffith, 18 Gratt. 574; Atwood v. Geiger, 69 Ga. 498 (codicil and will); Kean v. Roe, 2 Harring. 103; 2 Jones Eq. 202; Crawford v. Redus, 54 Miss. 700; Post v. Jackson, 70 Conn. 283, 39 A. 151; Scott's Estate, 163 Penn. St. 165, 29 A. 877.

<sup>4</sup> Wagner v. Sharp, 33 N. J. Eq. 520 (all children of brothers or sisters). See also as to collective description, 3 Bro. C. C. 367; 12 Sim. 167, 184; Payne v. Webb, L. R. 19 Eq. 26; Pitney v. Brown, 44 Ill. 363; 38 N. J. Eq. 348; Scott v. Terry, 37; Miss. 64; 3 C. E. Green, 231; 118 Ill. 403, 9 N. E. 210; Senger v. Senger, 81 Va. 687; 72 Ga. 825; 64 N. H. 328, 10 A. 702; 142 Mass. 240, 7 N. E. 771 ("in equal shares"); 13 S. C. 512.

But this construction yields readily, as in other cases, to indications in the will of a contrary purpose, or to intended consonance with the statute policy of lineal representation, if such be the fairer conclusion from the whole context. And the instances where the presumption has thus given way are very many. See 19 N. C. 207; 113 N. Y. 366, 21 N. E. 1115; 118 Ind. 23, 20 N. E. 519; Lockwood's Appeal, 55 Conn. 157, 10 A. 517; 67 Conn. 8, 34 A. 758; 4 Beav. 239; Hawkins v. Hammerton, 16 Sim. 410; 1 Mer. 358; (1895) 2 Ch. 196. As to a substitutional gift, see Price v. Lockley, 6 Beav. 180; 4 De G. F. & J. 327. And see Ferrer v. Pyne, 81 N. Y. 281; 83 N. Y. 505; 30 N. J. Eq. 595; Ederly v. Barker, 66 N. H. 434, 28 L. R. A. 328, 31 A. 900. And generally where the other dispositions in the will lead easily to a contrary interpretation. Adams v. Adams, 2 Jones Eq. 217; 136 Penn. St. 222, 20 A. 421. See 6 Ired. Eq. 487; 7 Rich. Eq. 132; Walker v. Griffin, 11 Wheat. 375, 6 L. Ed. 498;



541. Occasion has sometimes arisen for applying this distinction of *per capita* and *per stirpes* where the devise or bequest is to tenants for life with a remainder over. Here the conclusion, where no plainer signs of a testator's intent appear, must depend much upon whether the tenants for life take with or without a right of survivorship.<sup>1</sup>

542. The meaning of the words "heirs" and "next of kin" as applicable to a testator's personal estate deserves attention.<sup>2</sup> The word "heirs" in a bequest of personal property, referring to the heirs of A, means, *prima facie* the persons who would be entitled to that property had A died intestate; and this whether A is the testator himself, or some one else named in the will, and whether the gift is substitutional (as in the bequest to "A or his heirs")<sup>3</sup> or original (as to the "heirs of A").<sup>4</sup> A just regard for local law of

Carter v. Lowell, 76 Me. 342; Campbell's Trusts, 31 Ch. D. 685; aff. 33 Ch. D. 98. And see (*per stirpes*) 79 N. E. 260, 193 Mass. 284, 118 Am. St. Rep. 497; 146 Cal. 12, 79 P. 514; 64 A. 1041, 104 Md. 262; 64 N. E. 267, 197 Ill. 144; Lee v. Baird, 44 S. E. 605, 132 N. C. 755; (*per capita*) 110 N. W. 599, 133 Iowa, 215; 56 S. E. 473, 61 W. Va. 262, 12 L. R. A. (N. S.) 283; 39 S. E. 395, 113 Ga. 889; 104 S. W. 340, 31 Ky. Law, 888. Local statutes may be found extending the favor of the law to the rule of *per stirpes* or representation of an ancestor's share. 15 R. I. 171, 2 A. 302; 46 Ohio St. 307, 24 N. E. 599; 81 Me. 268, 17 A. 66; 84 Mich. 567, 48 N. W. 183. The policy of our local statutes of distributions will be found to favor the right of representation more fully as to lineal than collateral kindred. See Woodward v. James, 115 N. Y. 346, 22 N. E. 150. And the will itself may indicate that the testator actually intended to supersede statute policy. See 117 N. C. 122, 23 S. E. 92; Scott's Estate, 163 Penn. St. 165, 29 A. 877.

<sup>1</sup> Swan v. Holmes, 19 Beav. 471; Wills v. Wills, L. R. 20 Eq. 342; 1 De G. & S. 355; 161 Ill. 60; Ballentine v. Foster, 30 S. E. 481, 128 Ala. 638; 3 Bro. C. C. 50; Taaffe v. Conmee, 10 H. L. Cas. 64; 18 Beav. 590; Nockolds v. Locke, 3 K. & J. 6. A disposition to give to children *per capita* appears restrained only by the inconvenience of identifying them together as distributees, when shares go over separately and at different times as each life tenant dies, and there might be more children to take one share than another unless the *per stirpes* rule were applied. Cases *supra*; 2 Jarm. Wills, 197, 198. Nor can even this inconvenience override a testator's manifest intent. 16 Beav. 431; Swabey v. Goldie, 1 Ch. D. 380; 1 Mer. 359. See as to conformity with local statute policy, 161 Ill. 60, 43 N. E. 848.

<sup>2</sup> The old Statute of Distributions of Charles II, though at the basis of our American jurisprudence, by no means fixes the prevailing rights of kindred in the systems of the several States; but measuring these rights constantly by local statute, we have come to use "next of kin" in a sense relative to such local legislation as may apply. And as for the rights of widow or surviving husband in a decedent's estate, we consult our written law, whether styled a Statute of Distributions, or bearing any other title. All this is important, when we consider that what a testator probably intended by his choice of words is the main point at issue.

<sup>3</sup> 2 My. & K. 69; 2 Jarm. Wills, 79; Doody v. Higgins, 9 Hare, 32 ("forever" does not alter); Newton's Trusts, L. R. 4 Eq. 173; 1 J. & W. 388.

<sup>4</sup> 16 Beav. 557; Porter's Trusts, Re, 4 K. & J. 188; 7 Allen, 76; 1 Hoff. Ch. 212; Ashton's Estate, 134 Penn. St. 390, 19 A. 699; 136 Penn. St. 153, 20 A. 397; 110 N. W. 599, 133 Iowa, 215; 65 A. 761, 102 Me. 63; 107 N. Y. S. 951; 55 A. 92, 65 N. J. Eq. 119; Ferguson v. Stewart, 14 Ohio, 140; Nelson v. Blue, 63 N. C. 660; Ward v. Saunders, 3 Sneed, 391; 2 Duv. 296; Evans v. Godbold, 6 Rich. Eq. 26; Sweet v. Dutton, 109 Mass. 589, 12 Am. Rep. 744; 146 Mass. 345, 15 N. E. 660; Ruggles v.

distributions in this country may well exclude both husband and wife from taking as "heir";<sup>1</sup> and the local law, if not clearly waived by the testator himself, ought to conclude the point, whether favorably or unfavorably to a surviving spouse. In American acceptance, the husband is neither heir nor next of kin to his wife, generally speaking; nor is the widow heir or next of kin to her husband.<sup>2</sup>

543. As for the expression, "next of kin," when employed in a bequest of personalty, the English precedents, after much conflict of authority, concluded it to import *prima facie* by itself a gift by way of joint tenancy to the nearest blood relations of the *propositus* in equal degree under the civil computation.<sup>3</sup> The true intent of the will should prevail against any perversion of words from their

Randall, 70 Conn. 44, 38 A. 885. In other words, heirs is not "next of kin" according to the civil computation, but the statutory next of kin or distributees, those who for the purpose of succession stand in a position analogous to that occupied by heirs as to real estate, under the law of descent. This presumption favors testamentary intent, notwithstanding the word "heirs" is technical and inappropriate to personal estate. *Hascall v. Cox*, 49 Mich. 435, 13 N. W. 807.

<sup>1</sup> *Lord v. Bourne*, 63 Me. 368, 18 Am. Rep. 234; *Richardson v. Martin*, 55 N. H. 45; *Tillman v. Davis*, 95 N. Y. 17, 47 Am. Rep. 1. See 26 Penn. St. 217. English cases included a widow but not a surviving husband in such bequests. 2 K. & J. 738; *Hawkins Wills*, 92.

<sup>2</sup> 106 Penn. St. 176, 216, 51 Am. Rep. 516, 519. But local statute may change this rule. *Lincoln v. Aldrich*, 149 Mass. 368, 21 N. E. 671, 4 L. R. A. 215. See *Henderson v. Henderson*, 1 Jones L. 221 (context); 56 N. E. 62, 183 Ill. 463.

The word "heirs" is flexible on the whole, and may denote "next of kin" or "heirs at law," according to the nature of the property given, as well as next of kin in one sense or another. *Ingram v. Smith*, 1 Head, 411; *Sweet v. Dutton*, 109 Mass. 589, 12 Am. Rep. 744; 146 Mass. 424. As to "heir" in a devise of real estate, see 545-553, *post*, at more length. But what this word signifies is in all cases a question of intention. *Den v. Zabriskie*, 15 N. J. L. 404; 3 Rich. Eq. 156; *Love v. Buchanan*, 40 Miss. 758; 18 B. Mon. 329; 53 Md. 550; 4 Pick. 198; 5 Penn. St. 461; 6 Ala. 431; 2 Desau. 94; 25 S. C. 289. "Issue," "children," "heirs" are constantly interchanged in testaments. *Collier v. Collier*, 3 Ohio St. 369; *Hayne v. Irvine*, 25 S. C. 289; *Johnson v. Brasington*, 156 N. Y. 181, 50 N. E. 859; 117 Ind. 308, 20 N. E. 230. See 144 Mass. 441, 11 N. E. 729 (adoption); 41 N. J. Eq. 414, 5 A. 650; *Howell v. Ackerman*, 89 Ky. 22, 11 S. W. 819 (conversion from real to personal property). And see *Barber v. Pittsburg R.*, 166 U. S. 83, 108, 4 L. Ed. 925 (heirs apparent, etc.). The word "heirs" when used to denote succession in a gift of personalty is a misnomer, but courts yield to intention. 180 Penn. St. 82.

<sup>3</sup> *Elmesley v. Young*, 2 My. & K. 780; *Withy v. Mangles*, 4 Beav. 358; s. c., 10 Cl. & F. 215; 2 Jarm. Wills, 108-111. American precedents may be found of the same purport. 5 Jones Eq. 236; 5 Ired. Eq. 382; *Redmond v. Burroughs*, 63 N. C. 242; Hoff. Ch. 202. See *Field, J.*, in *Swasey v. Jaques*, 144 Mass. 135, 138, 59 Am. Rep. 65, 10 N. E. 758. To carry the gift to next of kin, according to the Statute of Distributions, one ought to express himself to that effect, or at least imply such a purpose; in which case the right of representation and *per stirpes* will take effect, and legatees take as tenants in common. *Bullock v. Downes*, 9 H. L. Ca. 1; L. R. 6 Eq. 601. See 2 Jarm. Wills, 109; *Halton v. Foster*, L. R. 3 Ch. 505; *Thompson's Trusts*, 9 Ch. D. 607. Such a rule of construction would put the father of a testator on the same footing as his own children, where he gives simply to his "next of kin," and among children ignore utterly the right of representation. See Exrs. 498-502. How contrary this is to one's natural intent we need not argue. *Withy v. Mangles*, 10 Cl. & F. 215, *per* Lord Campbell.

usual meaning; and authorities will often best further this intent by presuming "next of kin" to mean, as it does in popular usage, those whom public policy and legislation recognize as such, and not computing them by the antiquated and unjust rule of the canonists.<sup>1</sup>

544. "Representatives" or "executors and administrators" are terms found in wills.<sup>2</sup>

545. Wherever real estate is not beneficially disposed of under the will, through lapse or otherwise, the beneficial interest therein devolves presumably upon the heir or heirs at law; in other words, it goes according as the local statute may have cast the inheritance in case of intestacy. And since the statute rules for personalty and realty, for next of kin and the technical heirs, for distribution and descent, do not always coincide, this distinction by the species of property should be borne in mind.<sup>3</sup>

<sup>1</sup> At all events, under a gift to own "next of kin," whether simply or under the Statute, the widow takes nothing, nor of course does a surviving husband; for married persons are not "next of kin" to one another. 14 Ves. 372; 1 Penn. St. 506; Irvin's Appeal, 106 Penn. St. 176, 51 Am. Rep. 516; Platt v. Mickle, 137 N. Y. 106, 32 N. E. 1070; 67 N. Y. 387; 542 *supra*.

<sup>2</sup> A bequest to the "representatives," or the "personal" or "legal personal representatives" of any one, whether of the testator or some one else designated, is taken to intend *prima facie* one's executors or administrators. 1 R. & My. 587; 37 N. J. Eq. 445; 4 De G. & J. 477; 2 Drew. 230; Ware, *Re*, 45 Ch. D. 269. A wife who makes her will and dies soon after her husband, may thus return the property she received under his will to his estate. Halsey v. Paterson, 37 N. J. Eq. 445. See also Briggs v. Walker, 171 U. S. 466, 19 S. Ct. 1; Tarrant v. Backus, 63 Conn. 277, 28 A. 46; Cox v. Curwen, 118 Mass. 198; 74 N. E. 101, 215 Ill. 132. Courts have often avoided that construction by considering the statutory heirs or next of kin as "representatives" in a layman's looser sense, and under that description fulfilling the policy of the law by making the bequest operate as though the giver had died intestate in respect of such property. Bridge v. Abbot, 3 Bro. C. C. 224; 2 Beav. 67; 2 Jarm. Wills, 111; Horner, *Re*, 37 Ch. D. 695; Davies v. Davies, 55 Conn. 319; 43 N. J. Eq. 95; 27 N. J. Eq. 135; 3 Edw. Ch. 270; Gibbons v. Fairlamb, 26 Penn. St. 217; Thompson v. Young, 25 Md. 450; 12 Rich. Eq. 260. And see 4 De G. & J. 477; 53 Conn. 261. 2 A. 325; 52 A. 803 (R. I. 1902); Miller v. Metcalf, 58 A. 743, 77 Conn. 176. And in other instances they have presumed that the gift, whether to the personal representative, or to executors and administrators, meant that the legal representative should take the property in his fiduciary character only, and not as the rightful owner. See 2 Hare, 523. And see as to context, Stockdale v. Nicholson, L. R. 4 Eq. 359; 3 Ves. 146; 19 Beav. 448; 7 Hare, 225; Atherton v. Crother, 19 Beav. 448.

"Executors and administrators," or "legal representatives," are terms naturally used as mere words of limitation. Appleton v. Rowley, L. R. 8 Eq. 139. But otherwise, cf. Price v. Strange, 6 Madd. 159; 1 Coll. 108 (substitution); Trethewy v. Helyar, 4 Ch. D. 53. Whether, however, the property shall vest in the representative for his own benefit is another thing. Apart from legislation, it is true, an executor or administrator, a legal representative, may be made a legatee if the testator so directs explicitly. See Wallis v. Taylor, 8 Sim. 241. But the general purport of such gifts is *prima facie* that the representative constituted by the court takes the gift not beneficially but as part of the estate which he represents. Holloway v. Clarkson, 2 Hare, 523; 4 Ch. D. 53. See also 6 Dem. 166 ("executor" merely descriptive of A); 116 Mo. App. 308, 90 S. W. 1170.

<sup>3</sup> 1 Jarm. Wills, 565-583; Cro. El. 243; 1 P. Wms. 390; 2 Bro. C. C. 589; 1 Hoff. 203; Tilghman, *Re*, 5 Whart. 44; King v. Mitchell, 8 Pet. 326 8 L. Ed. 962 Hence

546. **As between a residuary devisee under the will, however, and the heir at law,** it may be necessary to determine which of the two shall take the realty undisposed of in preference to the other. Here the modern rule, which tends to assimilate dispositions of real and of personal property in principle, favors the residuary devisee, if there be one, above the heir, and carries to him *prima facie* all real estate or interest in real estate comprised in any void or lapsed devise.<sup>1</sup>

547. **As applied to real estate, solely, "heirs" are those persons** upon whom, under the policy of the jurisdiction where the land lies, the inheritance is cast in case the owner dies intestate.<sup>2</sup> If, therefore, property real and personal be blended under a gift expressed to "heirs," our modern construction fitly regards the testator's probable purpose as to each element of the disposition.<sup>3</sup>

548. **Where, then, a testator devises real estate to his heir,** or to his heir at law or his right heirs, the person or persons who may answer this description at the testator's death are presumably entitled.<sup>4</sup> What is said of a devise expressed to a testator's own heir applies equally where land is devised to the heir of some other person designated in the will.<sup>5</sup>

is derived the familiar doctrine of a resulting trust in favor of the heir upon the true interpretation of a devise, in case not only of a general and total but of a particular and partial failure of disposition under the will. Cases *supra*; 2 Ves. Jr. 683; 1 Bro. C. C. 503. This supposes that the testator's real intent is not shown to be contrary. See also 18 Ves. 254; Gloucester v. Wood, 1 H. L. Cas. 272; Easterbrooks v. Tillinghast, 5 Gray, 17.

<sup>1</sup> *Supra*, 521; Act 1 Vict. c. 26, § 25; Green v. Dunn, 20 Beav. 6; Tongue v. Nutwell, 13 Md. 415; Thayer v. Wellington, 9 Allen, 283, 85 Am. Dec. 753; 2 Jarm. Wills, 646-651. But intent prevails. Bosley v. Bosley, 14 How. 390, 14 L. Ed. 468.

<sup>2</sup> Under the English statute 3 & 4 Will IV, c. 109, § 3, the heir takes realty in the character of devisee, and not as formerly by descent. 2 Jarm. Wills, 61. In the United States each State defines the inheritance by its own statute. But cf. as to popular use of "heirs," *supra*, 542.

<sup>3</sup> As to technical sense where funds are blended, see Smith v. Butcher, 10 Ch. D. 113, as cited in 25 Ch. D. 214; 7 Bing. 226. But elastic sense otherwise. 9 Ch. D. 658; Keay v. Boulton, 25 Ch. D. 212 and cases cited; De Beauvoir v. De Beauvoir, 3 H. L. C. 524; Sweet v. Dutton, 109 Mass. 589, 12 Am. Rep. 744; 152 Mass. 457, 25 N. E. 838. "Heir at law" may thus be construed as meaning "next of kin," as regards the personalty. Swenson's Estate, 55 Minn. 300, 56 N. W. 1115. And see Mounsey v. Blamire, 4 Russ. 384; Lord Chancellor Cottenham in Withy v. Mangles, 10 Cl. & F. 215, 253. See also 2 Jarm. Wills, 81, 82. Intent prevails. See Fabens v. Fabens, 141 Mass. 395, 5 N. E. 650; 192 Mass. 367, 116 Am. St. Rep. 246, 10 L. R. A. (N. S.) 1143, 78 N. E. 422.

<sup>4</sup> Mounsey v. Blamire, 4 Russ. 384 (no plural needed); Skinn. 206.

<sup>5</sup> But as to the heir of a living person, see 2 Jarm. Wills, 71. And cf. Heard v. Horton, 1 Denio, 168, 43 Am. Dec. 659; Carne v. Roche, 7 Bing. 226; 2 W. Bl. 1010; 1 Dev. & B. Eq. 393. And see Campbell v. Rawdon, 18 N. Y. 412 (secondary meaning). As to "legal heirs," see Healy v. Healy, 70 Conn. 467, 39 A. 793; Heard v. Reed, 169 Mass. 216, 47 N. E. 778.

549. In a devise of lands neither "heirs" nor any other word or words of inheritance or limitation need at the present day be super-added in order to pass a fee;<sup>1</sup> but the simple devise to A shall be construed to mean a devise in fee (or, at least, all the testator's interest in the property), unless the will clearly imports a different intention.<sup>2</sup>

550. The words "estate," "property," "residue," "remainder," are also considered.<sup>3</sup>

The presumptive and proper meaning of "heir" yields, of course, to the context and probable meaning of any will in controversy taken as a whole. *Ld. Raym.* 330; 2 *Jarm. Wills*, 72; *Morton v. Barrett*, 22 Me. 557. And see *Haverstick's Appeal*, 103 Penn. St. 394; *Hinton v. Milburn*, 23 W. Va. 166; *Barton v. Tuttle*, 62 N. H. 558.

<sup>1</sup> The rule of interpretation was formerly different; but modern legislation has changed the presumption. *Supra*, 483, 485. See also 2 *Jarm. Wills*, 267, 268; 4 *Kent* 5-8.

<sup>2</sup> "I give my lands," "all the rest, residue and remainder of my land," "all my lands," etc., are good expressions at this day for giving an absolute interest to the devisee and not a mere life estate.

In order to meet the old requirements of our law, and for the sake at all times of leaving one's intention clear of doubt, a devise in fee simple has properly been drawn up, so as to give the land to "A and his heirs," or to "A, his heirs, and assigns forever;" but numerous other expressions are sustained by the courts. *Co. Lit.* 9 b; 8 *Vin. Ab.* 206; *Read v. Snell*, 2 *Atk.* 645; *Wright v. Atkyns*, 17 *Ves.* 261; *McAllister v. Gale*, 11 *Rich.* 509; 144 *Penn. St.* 286, 13 *L. R. A.* 359, 22 *A.* 897 ("shall have and hold"); 26 *Penn. St.* 516 ("to A absolutely"). So with incidents of *ius disponendi*. 2 *Jarm. Wills*, 274, 275; *Jennings v. Conboy*, 73 *N. Y.* 230; 8 *Conn.* 277, 20 *Am. Dec.* 110; 1 *Harr.* 25; *Purcell v. Wilson*, 4 *Gratt.* 16; 17 *Pick.* 436, 28 *Am. Dec.* 311; *Sharp v. Sharp*, 6 *Bing.* 230 ("all right and title," etc.). It is not upon formal modes of expression that the force of the devise turns; for whenever, expressly or by implication, the will shows the purpose to give one's property in fee simple, that purpose shall prevail, and so conversely where a lesser estate was intended. That a devise of rents, profits, etc., will carry the inheritance, see *supra*, 503. See further, *Drewry v. Barron*, 11 *East*, 220; *Lloyd v. Jackson*, *L. R.* 1 *Q. B.* 571; *Wright v. Denn*, 10 *Wheat.* 204, 6 *L. Ed.* 303; *Bedford v. Bedford*, 99 *Ky.* 273, 35 *S. W.* 926.

When real estate is given absolutely to one person with a gift over to another of such portion as may remain undisposed of by the first taker at his death, the gift over is void as repugnant to the absolute property first given; and wherever an estate is given to a person generally or indefinitely with a power of disposition, or to him, his heirs and assigns forever, it carries a fee, and any limitation over or qualifying expression of less import is void for repugnancy. The only exception to such a rule is where the testator gives to the first taker an estate for life only by certain and express terms, and annexes to it the power of disposition. In that particular and special case the devisee for life will not take an estate in fee, notwithstanding the naked gift of a power of disposition. *Mulvane v. Rude*, 146 *Ind.* 482, 483, 45 *N. E.* 659; 144 *Ill.* 554, 33 *N. E.* 751; *Kendall v. Clapp*, 163 *Mass.* 69, 39 *N. E.* 773; 9 *S. W.* 875, 197 *Mo.* 550; *McClure, Re*, 136 *N. Y.* 238, 32 *N. E.* 758; *Law v. Douglas*, 107 *Iowa*. 606, 78 *N. W.* 212; 177 *Ill.* 606, 52 *N. E.* 843. See 559, 560.

<sup>3</sup> Since "estate" may denote the *quantum* of interest as well as the *corpus* of the property, this word has been given a free scope in passing the inheritance real and personal wherever its interpretation in a will may consist with such an intent. See *Jackson v. Delancey*, 13 *Johns.* 537, 7 *Am. Dec.* 403; *Archer v. Deneal*, 9 *Pet.* 585, 9 *L. Ed.* 238; 25 *Penn. St.* 142; 107 *Mass.* 590; *supra*, 484. And see 18 *Pick.* 539, 29 *Am. Dec.* 621; 6 *Taunt.* 410. The operation of the word "estate" may doubtless be restrained by the context, and any presumption that a fee was given is overcome when the whole will discloses an opposite purpose. 2 *Jarm. Wills*, 282.

"Property" is a word which may, like "estate," operate presumably to pass the whole inheritance, real and personal. 18 *Ves.* 193; *Leland v. Adams*, 9 *Gray*, 171;

551. Lord Coke laid down another rule in favor of the heir general or heir-at-law, wherever one devised to "heirs male of the body" of a person; which rule, however, is now repudiated.<sup>1</sup> An estate tail may frequently be created under a devise by words less precise and formal than in a conveyance; and upon the theory that the testator intended some qualification upon the inheritance, that intention operates accordingly.<sup>2</sup>

552. The rule of *Archer's Case* deserves notice in this connection: that where an estate is limited by devise to A for life, with remainder to the heir male of his body (in the singular number), and to the heirs male of the body of such heir male, A has an estate for life only, while the heir male of his body takes an estate in tail male as purchaser.<sup>3</sup>

553. As to estates tail, the rule in *Shelley's Case* has been so inflexibly asserted against all indications of what a testator really meant, that many pronounce it a rule of law and not of construction, like the rules which forbid perpetuity and mortmain;<sup>4</sup> but the doctrine seems to have hardened by degrees, through the reluctance of the courts to disturb landed titles.<sup>5</sup>

*Coltsmann v. Coltsmann*, L. R. 3 H. L. 121; *Rossetter v. Simmons*, 6 S. & R. 452. Under the words "remainder" or "reversion" a remainder in fee or a reversion in fee was carried under the old rule; but the words "residue" and "remainder," as commonly used in residuary clauses, did not operate with similar force according to English precedent, though in this country, as well as under the modern rule, a fee of the residue should generally be presumed. 2 Ves. 48; 1 Ld. Raym. 187; 2 Jarm. Wills, 284, 285; *Denn v. Mellor*, 5 T. R. 558; *Parker v. Parker*, 5 Met. 134.

The abolition of the technical rule which favored the heir at the cost of the devisee wherever a devise was made without words of limitation is generally commended. See 2 Jarm. Wills, 287. A testator may give one-third or some other proportion of all his property so as to vest that undivided interest absolutely in his devisee. *Roseboom v. Roseboom*, 81 N. Y. 356; *Waterman v. Green*, 12 R. I. 483.

<sup>1</sup> Co. Lit. 246. Cf. *Wills v. Palmer*, 5 Burr, 2615; *Angell v. Angell*, 9 Q. B. 328. See also Co. Lit. 25 a; *Bernal v. Bernal*, 3 M. & Cr. 559; 2 Jarm. Wills, 325; *Lindsey v. Colyear*, 11 East, 548.

<sup>2</sup> *Cuffee v. Milk*, 10 Met. 366. An "estate tail," or "estate in fee-tail," is an inheritable estate which will descend to certain classes of heirs. It is properly created by the words "heirs of the body," of, etc. 1 Washb. Real Prop. 51, 66. But cf. *Dennett v. Dennett*, 43 N. H. 499; *McIntyre v. Ramsey*, 23 Penn. St. 317. And see *Wright v. Vernon*, 2 Drew. 439; 7 H. L. Cas. 35; 7 Ell. & B. 295; 17 Beav. 254.

<sup>3</sup> *Archer's Case*, 1 Rep. 66; *Willis v. Hiscox*, 4 My. & Cr. 197. And see 1 Sumn. 235; *Doe v. Laming*, 2 Burr. 1100; *Canedy v. Haskins*, 13 Met. 389, 46 Am. Dec. 739; 2 My. & Cr. 387; *Chamberlayne v. Chamberlayne*, 6 E. & B. 625.

<sup>4</sup> *Hawkins Wills*, Preface; 2 Jarm. Wills, 332; 4 Kent Com. 245.

<sup>5</sup> The rule of *Shelley's Case* is simply that where real estate is devised to a person, and there is a limitation besides, either mediate or immediate, to his heirs or the heirs of his body, "heirs" must be taken as a word not of purchase, but of limitation only, for the marking out the quality of the estate, and that the ancestor takes the whole estate comprised in the gift. If, therefore, the limitation be to the heirs of his body, he takes a fee tail, and if to his heirs general, a fee simple. *Perrin v. Blake*, 4 Burr 2579; *Jesson v. Wright*, 2 Bligh, 1; *Fetherstone v. Fetherstone*, 3 Cl. & F. 67; 3 B. &

554. The word "issue" is of itself less precise and technical than "heirs of the body," though collective in sense and serving to point out as objects of the devise all the generations of descendants.<sup>1</sup>

P. 627; *Curtis v. Longstreth*, 44 Penn. St. 302; *Jordan v. Adams*, 9 C. B. N. S. 483; 17 Wall. 639, 21 L. Ed. 661. *Shelley's Case*, 1 Rep. 93, does not directly involve this principle, but discusses it at much length; later cases, however, confirmed the rule. In a valuable note to 2 Jarm. Wills, 332, Mr. Bigelow states that this same doctrine had been laid down as early as 1325, or more than two and a half centuries before *Shelley's Case*. And see *Richardson v. Harrison*, 10 Q. B. D. 85; *Sisson v. Seabury*, 1 Sumn. 235; *Criswell's Appeal*, 41 Penn. St. 288; 5 R. I. 273; *Daniel v. Whartenby*, 17 Wall. 639, 21 L. Ed. 661, *per* Mr. Justice Swayne; *Simms v. Buist*, 52 S. C. 554, 30 S. E. 400; *Ewing v. Barnes*, 156 Ill. 61, 40 N. E. 325; 169 Penn. St. 74, 32 A. 113. This doctrine has prevailed since the days of Coke in all transfers of real estate whether by conveyance or by last will and testament. It applies as well whether the limitation be expressed to heirs at once or after some intervening estate. In short, the force of the express words of inheritance overpowers all distributive directions with which these words may happen to be coupled, and such inconsistent directions may be rejected as repugnant to the devise. Yet, while in the course of time substance has here so frozen into the form, it seems to have been conceded all the while in principle that whenever it is perfectly clear in a given case, from other language, that the testator used the technical words not according to the rule but contrary to it, his intention will prevail against any mere technical expression. 2 Ld. Raym. 1561; *Goodtitle v. Herring*, 1 East, 264. See 23 Beav. 184; 3 C. B. 349; 2 Jarm. Wills, 332-389; *Van Grutten v. Foxwell*, (1897) App. C. 658. American precedents yield more in this respect than the English. See 3 Binn. 139, 5 Am. Dec. 355; *Blake v. Stone*, 27 Vt. 475; *Slemmer v. Crampton*, 50 Iowa, 302; *Fulton v. Harmon*, 44 Md. 251; 13 R. I. 712, and cases cited; *Woodruff v. Woodruff*, 32 Ga. 358. And, in fact, the rule of *Shelley's Case*, whose policy, never clearly revealed, is one of bygone times, has been abolished or changed by statute in most of our States. *Hawkins Wills*, 184, *Sword's note*; 2 Jarm. Wills, 332, *Bigelow's note*, 62 N. H. 44. While in others the courts unaided have long felt competent to regard it as affording a mere presumption and no more, in those unfrequent cases where the question is raised for testamentary construction. *Smith v. Hastings*, 29 Vt. 240; *Hamilton v. Wentworth*, 58 Me. 101; 15 Ohio, 559; 14 B. Mon. 570; *Daniel v. Whartenbury*, 17 Wall. 639, 21 L. Ed. 661; 30 Ky. L. R. 857, 99 S. W. 925; *Clemens v. Hecksher*, 185 Penn. St. 476, 40 A. 80; 121 N. C. 326, 28 S. E. 489; *Wescott v. Binford*, 104 Iowa, 645, 65 Am. St. Rep. 530, 74 N. W. 18. But cf. 118 Penn. St. 94, 11 A. 802; 108 Ind. 506, 9 N. E. 467; *Ryan v. Allen*, 120 Ill. 648, 12 N. E. 65; 101 N. C. 162, 7 S. E. 657, 9 Am. St. Rep. 30; 147 Ind. 388, 45 N. E. 691.

As a word of limitation, "heirs" is collective, and signifies all the descendants *ad infinitum*; but when taken as a word of purchase it may denote particular persons who answer the description at a particular time and in a special sense, according to the case presented. *Fulton v. Harman*, 45 Md. 251. And if technical words are used not collectively for the inheritable successor, but distributively for particular persons, such persons will take as purchasers, unless the artificial rules we have considered are too obstinate to yield to the obvious meaning of the instrument. *Burges v. Thompson*, 13 R. I. 712, 717. See *Connor v. Gardner*, 82 N. E. 640, 230 Ill. 258; *Reimer v. Reimer*, 44 A. 316, 192 Penn. 571, 73 Am. St. Rep. 833; 73 S. W. 662, 173 Mo. 572; 44 S. E. 904, 101 Va. 537, 63 L. R. A. 920; 46 A. 1094 (N. J. Eq.); 80 N. E. 249, 225 Ill. 408; *Webb v. Sweet*, 79 N. E. 1024, 187 N. Y. 172; 50 A. 1001, 201 Penn. 201. And see 48 S. E. 785, 136 N. C. 460, 67 L. R. A. 444 (word "lawful" immaterial).

<sup>1</sup> *Prima facie* equivalent expressions. *Roddy v. Fitzgerald*, 6 H. L. C. 823; 1 K. & J. 352; *Bradley v. Cartwright*, L. R. 2 C. P. 511; 2 Jarm. Wills, 411-439; *King v. Savage*, 121 Mass. 303; 61 Ga. 77; *Robins v. Quinliven*, 79 Penn. St. 333. But expressions may overcome this presumption. *Slater v. Dangerfield*, 15 M. & W. 273; *Greenwood v. Rothwell*, 5 M. & G. 628; *Powell v. Board of Missions*, 49 Penn. St. 54. And see 1 Strobh. Eq. 344.

Our American doctrine favors a flexible construction of the word "issue" according to the whole purport of the will under consideration; and while courts may take it

555. While "children" is not commonly a word of limitation, the influence of the rule in Shelley's Case has been felt in devises where this term was used instead of "heirs of the body" or "issue."<sup>1</sup>

556. Refinements of construction relative to estates tail may be studied in the English cases and text-books, though the statute of Victoria has pruned away much of the learned excrescence with which centuries had loaded this subject. In the United States estates tail are at this day either entirely abolished and converted into fees simple, or so changed as to vest an estate for life in the first taker with remainder over in fee, or otherwise disfavored by the local enactment.<sup>2</sup>

557. In bequests of personalty, on the other hand, there never was a technical rule requiring words of inheritance to be annexed to a simple gift; and technical expressions which have operated only a life estate or conditional fee, so far as land was concerned, will constitute an absolute gift when applied to personal property.<sup>3</sup>

as *prima facie* a word of limitation, like "heirs of the body" in a devise, it becomes a word of purchase whenever the context prefers that meaning by using the words in a special or limited sense. And many of our local acts which change or abolish the rule in Shelley's Case, turn "issue" as well as "heirs" or "heirs of the body" into words of presumable purchase. *King v. Savage*, 121 Mass. 303; *Robins v. Quinliven*, 79 Penn. St. 333; *Daniel v. Whartenby*, 17 Wall. 639, 21 L. Ed. 661; *Arnold v. Alden*, 173 Ill. 229, 50 N. E. 704; 152 Penn. St. 18, 25 A. 231. "Lineal descendants" and "issue" used, instead of "heirs." *Henderson v. Henderson*, 64 Md. 185, 1 A. 72. Cf. 117 Penn. St. 127; *Paine v. Sackett*, 61 A. 753, 27 R. I. 300. Or "heirs" in the sense of "children." 109 Ind. 476, 58 Am. Rep. 428, 9 N. E. 919. And see 78 Me. 226; 24 S. C. 304; 136 Penn. St. 142, 20 A. 645; 127 Ind. 397, 22 Am. St. Rep. 652, 26 N. E. 895; *Madison v. Larmon*, 170 Ill. 65, 62 Am. St. Rep. 356, 48 N. E. 556. And see *Bowerman v. Sessel*, 61 N. E. 369, 191 Ill. 651; *Englerth v. Kellar*, 40 S. E. 465; 50 W. Va. 259; 85 S. W. 169, 119 Ky. 899; *Morrisett v. Stevens*, 48 S. E. 661, 136 N. C. 171; 47 A. 841, 197 Penn. 615 (Ohio rule); *Willis's Will*, 55 A. 889, 25 R. I. 332; 46 A. 495, 196 Penn. 426; 77 N. E. 208, 220 Ill. 181; 110 Am. St. Rep. 243, 53 A. 866, 24 R. I. 502.

<sup>1</sup> An early precedent established in England that a devise of real estate to A and his children, A having no children at the date of the will, would vest in A an estate tail, "children" being here construed as a word of limitation. *Wild's Case*, 6 Rep. 17. See 15 Pick. 104; 1 Sumn. 359; *Hilliary v. Hilliary*, 26 Md. 275; *Miller v. Hart*, 12 Ga. 459. *Contra*, *Carr v. Estill*, 16 B. Mon. 309, 63 Am. Dec. 548; *Turner v. Ivie*, 5 Heisk. 222. See also *Webb v. Byng*, 2 K. & J. 669; affirmed in 10 H. L. C. 171; *Wheatland v. Dodge*, 10 Met. 502; 82 N. E. 640, 230 Ill. 258; 1 De G. F. & J. 613; *Roper v. Roper*, L. R. 3 C. P. 32. "Son" or "daughter" might have this effect; or "heir" or "child." 2 Jarm. Wills, 401-410.

<sup>2</sup> *Van Renssalaer v. Kearney*, 11 How. 297, 13 L. Ed. 703; 1 Pet. 510, 7 L. Ed. 242; 4 Kent Com. 14, 15; 73 Ga. 215; *Leathers v. Gray*, 101 N. C. 162, 9 Am. St. Rep. 30, 7 S. E. 657; 69 Vt. 272, 37 A. 747; *Teal v. Richardson*, 66 N. E. 435, 160 Ind. 119. The inclination is now to interpret each will untrammelled by set phrases. See *Hertz v. Abrahams*, 36 S. E. 409, 110 Ga. 707; 44 A. 1078, 198 Penn. 651; 48 A. 896, 198 Penn. 614; 60 N. E. 623, 64 Ohio St. 502.

<sup>3</sup> See 7 Bro. P. C. 453; 19 Ves. 73; *Williams v. Lewis*, 6 H. L. C. 1013; *Childers v. Childers*, 21 Ga. 377; 5 Ired. Eq. 7; *Dunlap v. Garlington*, 17 S. C. 567; *Mulvane v. Rude*, 146 Ind. 476, 45 N. E. 659. As to the expression "heirs of the body" or "issue" see 2 Jarm. 562-573; *Knight v. Ellis*, 2 Bro. C. C. 570; 5 D. M. & G. 188; *Myers's*



558. A person may bequeath personal property to A for life or a designated period, with remainder over to B, and this whether the goods and chattels or the use thereof be given to A by the express terms of the will.<sup>1</sup> It is a question of intention, under the will; and the testator thus intending it, A has merely a life or other temporary interest, while B takes a vested interest by way of remainder.<sup>2</sup> And generally speaking (subject, of course, to the rule against perpetuities),<sup>3</sup> one may create successive life or temporary interests by his will.<sup>4</sup>

559. Yet the decisions on such points seem sometimes to run closely together; and intention affords the only sure clue to their course.<sup>5</sup>

Appeal, 49 Penn. St. 111. But see 7 Rich. Eq. 358. 535, *supra*. And see *Parkin v. Knight*, 15 Sim. 83. As to parent and "children," see *Crockett v. Crockett*, 2 Phill. 553; 11 Sim. 41; *Cannon v. Apperson*, 14 Lea, 553.

<sup>1</sup> 1 Schoul. Pers. Prop. § 138; 2 Kent Com. 352; 2 Bl. Com. 398; 1 P. Wms. 1; *Smith v. Bell*, 6 Pet. 68, 8 L. Ed. 322; 41 N. J. Eq. 89, 3 A. 61.

<sup>2</sup> *Ib.*

<sup>3</sup> *Supra*, 21.

<sup>4</sup> But perishable articles, or those like wine, corn, and other articles of food or drink, whose use consists in their consumption, constitute usually an exception, since their use consists in consumption; though no presumption of this kind can be asserted against the obvious force and meaning of the will. 1 Schoul. Pers. Prop. § 140; *Randall v. Russell*, 3 Mer. 194; 144 N. C. 397, 57 S. E. 24. If the testator meant otherwise, it is easy to convert the perishable articles into money, and then invest for the benefit of life and remainder parties respectively. As to gift of consumable property, see 13 Ves. 445; *Pennock v. Pennock*, L. R. 13 Eq. 144; 36 Penn. St. 120; *Kendall v. Kendall*, 36 N. J. Eq. 91, 96; *Smith v. Bell*, 6 Pet. 68, 8 L. Ed. 322. See further, *Millard's Appeal*, 87 Penn. St. 457.

Where it is the testator's manifest intent to sever the product from its source, a bequest of the income of an estate consisting of personalty will not carry an absolute estate in the principal. *Bentley v. Kauffman*, 86 Penn. St. 99; 39 Ch. D. 50. Whether property be consumable or not, an absolute power of disposal in the first taker carries by presumption the absolute interest, and leaves any subsequent limitation of the property void. *Jones v. Bacon*, 68 Me. 34, 28 Am. Rep. 1; *Howard v. Carusi*, 109 U. S. 725, 27 L. Ed. 1089; 4 Del. Ch. 311; *Pennock v. Pennock*, and other cases, *supra*; *Yates v. Clark*, 56 Miss. 212; *Moehring, Re*, 154 N. Y. 423, 48 N. E. 818; *Glover v. Condell*, 163 Ill. 566, 45 N. E. 173. Cf. 1 Pick. 318, 11 Am. Dec. 178.

<sup>5</sup> See life estate in the widow and a vested remainder in the child. *Smith v. Bell*, 6 Pet. 68, 8 L. Ed. 322. And cf. absolute gift of personalty to the widow, with full right to appropriate the residue to herself after the estate was settled. *McKim v. Harwood*, 129 Mass. 75; *Fairfax v. Brown*, 60 Md. 50. Where, however, the power of disposal accompanies a bequest or devise of a mere life estate, the power is limited to such disposition as a tenant for life can make, unless other words clearly indicate that a larger power was intended. *Brant v. Virginia Coal Co.*, 93 U. S. 326, 23 L. Ed. 927; *Boyd v. Strahan*, 36 Ill. 355; 164 Ill. 398, 45 N. E. 820; 113 Ind. 18, 14 N. E. 571 (precatory words). Intent considered. 98 Tenn. 190, 39 S. W. 12; 162 Mass. 144, 38 N. E. 365; 68 A. 849, 80 Conn. 401; 57 S. W. 239, 22 Ky. L. R. 311; *Rinkenberger v. Meyer*, 56 N. E. 913, 155 Ind. 152; *Angus v. Noble*, 46 A. 278, 73 Conn. 56; *Bowen v. John*, 66 N. E. 357, 201 Ill. 292; *Hurdaker's Estate*, 53 A. 761, 204 Penn. 181; 56 A. 1086, 207 Penn. 550; *Barker v. Clark*, 56 A. 747, 72 N. H. 334; 61 S. W. 73, 106 Tenn. 341, 82 Am. St. Rep. 882; *Morehouse v. Morehouse*, 57 N. E. 1118, 161 N. Y. 654; 44 A. 528, 68 N. H. 376; 44 A. 219, 88 Md. 210; 63 S. W. 684, 163 Mo. 428; 86 N. W. 558, 111 Wis. 102; 86 N. W. 908, 62 Neb. 105; 49 A. 21, 73 Conn. 655; 56

560. **Remainders under a will may be vested or contingent;** though, in case of doubt, the former and simpler should in these days be preferred in construction.<sup>1</sup> Under the doctrine of executory devise, moreover, the limitation of a future estate or interest in lands or chattels is permitted by will where limitations in a deed *inter vivos* would have failed for informality; yet once more we should exclude the executory devise in construction if the estate can fairly pass as a remainder; or if an absolute estate can be properly inferred in the first taker.<sup>2</sup>

S. E. 222, 106 Va. 478; 109 N. W. 21, 146 Mich. 1; 31 So. 883, 107 La. 466; 59 S. E. 915, 129 Ga. 644; 83 N. E. 170 231 Ill. 329; 59 A. 740, 26 R. I. 509.

A fee which is given in the first part of a will may prove to be so restrained by subsequent words as to reduce it to a life estate. *North v. Martin*, 6 Sim. 266; *Ulrich's Appeal*, 86 Penn. St. 386, 27 Am. Rep. 707. But where a devise in fee is plainly given, it is not to be presumed that the testator meant by subsequent words to cut the estate down. 60 Md. 50. See, *supra*, 478, 518, 549. Notwithstanding any formal limitation over, the limitation over is void when the will shows a clear purpose to give an absolute power of disposition to the first taker. On the other hand, a power of disposition annexed to an express estate for life, or a charge upon it, is not properly construed as enlarging the latter into a fee unless inconsistent with an estate for life only. And, generally speaking, a larger estate will not be implied where a smaller one is expressly granted; for not only favor to the inheritance, but good sense, opposes such an inference. 5 Mass. 500; 10 Johns. 18; 110 Mass. 432; 4 Leigh. 408; *Howard v. Carusi*, 109 U. S. 725, 27 L. Ed. 1089; 78 Me. 313, 5 A. 73; 54 Conn. 470, 9 A. 136; 79 Ala. 63; *Wetter v. Walker*, 62 Ga. 142; *Farish v. Wyman*, 91 Va. 430, 435; *Corey v. Corey*, 37 N. J. Eq. 198; 53 N. J. Eq. 682, 33 A. 1050; *Hinkle's Appeal*, 116 Penn. St. 490, 9 A. 938; *Jones v. Jones*, 66 Wis. 310, 57 Am. Rep. 266, 28 N. W. 177; 14 R. I. 625; *Gadd v. Stoner*, 113 Mich. 689, 71 N. W. 1111; 136 Mo. 20, 37 S. W. 805; *Wilson v. Turner*, 164 Ill. 198, 45 N. E. 512; 84 Mo. 82; *Evans v. Folks*, 135 Mo. 397, 403, 37 S. W. 126. Local statutes are found. See 173 Penn. St. 181, 33 A. 1043. Independently of legislation the decisions are somewhat close and contradictory in applying the testator's apparent intent.

<sup>1</sup> *Olney v. Hull*, 21 Pick. 311; *Miller v. Keegan*, 14 Ind. 502; 2 Grant Cas. 28; *Smith v. West*, 103 Ill. 332; 113 Ky. 600, 68 S. W. 642; 64 N. E. 267, 197 Ill. 144; *De Vaughn v. McLeroy*, 82 Ga. 687, 10 S. E. 211; 41 Kan. 424, 3 L. R. A. 690, 21 P. 288. One reason for such a construction at common law is that the owner of the first particular estate may defeat a contingent remainder, and thus make the gift over by the will a dead letter.

<sup>2</sup> 8 Mass. 3, 5 Am. Dec. 66; 57 Conn. 163, 17 A. 766; 66 Conn. 401, 34 A. 110; *Howard v. Carusi*, 109 U. S. 725, 730, 27 L. Ed. 1089, and cases cited; 102 N. Y. 128, 55 Am. Rep. 771, 6 N. E. 121. See *Swayne, J.*, 6 Wall. 458, 474, 18 L. Ed. 869, for the above distinctions; 101 N. W. 195, 125 Iowa, 467. The corresponding term "executory bequest" is well applied in the gift of personal property, with future or expectant interests. 36 S. E. 404, 110 Ga. 729; 49 S. E. 690, 121 Ga. 693. Uncertainty whether remainderman will outlive life tenant does not make the remainder contingent. 101 N. W. 195, 125 Iowa, 467; 48 S. E. 785, 136 N. C. 460, 67 L. R. A. 444. See 56 A. 854, 76 Conn. 447 (alternate remainder upon contingency, as to personal estate); 46 S. E. 756, 134 N. C. 319. Intent prevails. See 153 Mass. 126, 25 Am. St. Rep. 614, 26 N. E. 429; *Van Horne v. Campbell*, 100 N. Y. 287, 53 Am. Rep. 166, 3 N. E. 316, 771; 15 R. I. 78, 23 A. 45; 67 Conn. 390, 52 Am. St. Rep. 285, 35 A. 271.

Local statutes sometimes provide that future estates, whether vested or contingent, are descendible. 6 Dem. (N. Y.) 220. As to the renunciation of such a gift by the life beneficiary, see *Defreese v. Lake*, 109 Mich. 415, 63 Am. St. Rep. 584, 32 L. R. A. 744, 67 N. W. 505. An absolute gift in the first taker may consist with a provision over as to whatever may remain undisposed of by such testator by will or otherwise.

561. A devise or bequest, whether absolutely or for life, will be raised by implication under a will, wherever the context requires it and the devise is not express in terms.<sup>1</sup> Implication is excluded, however, where a gift sufficient in effect was express; it is not deducible from mere silence; nor can it be admitted at all except as a means of carrying out what the testator appears on the whole to have really meant, but failed somehow to express as distinctly as he should have done.<sup>2</sup>

562. As a rule, a devise or a bequest is to be presumed vested, rather than contingent in interest; for whether the property be real or personal, the law favors the vesting of estates. A will takes effect naturally on the death of the testator; consequently interests under that will, whether immediate or prospective and by way of remainder in term of enjoyment, vest *prima facie* at once, and words of futurity contained in the gift should be taken in the sense that no condition precedent is imposed.<sup>3</sup> On the other hand, no

*Knight v. Knight*, 162 Mass. 460, 38 N. E. 1131. Cf. *ib.* 143, 38 N. E. 365; *Farish v. Wayman*, 91 Va. 430, 435, 21 S. E. 810; *Johnson v. Johnson*, 51 Ohio St. 446, 38 N. E. 61; 52 A. 449, 71 N. H. 412.

<sup>1</sup> 66 How. Pr. 381; 1 Sumn. 235; *Hill v. Thomas*, 11 S. C. 346; 1 Jarm. Wills. 533; *Masterson v. Townshend*, 123 N. Y. 458, 25 N. E. 928, 10 L. R. A. 816. And see 3 Keb. 589; 479, *supra*.

<sup>2</sup> *Patton v. Randall*, 1 J. & W. 196; *Rathbone v. Dyckman*, 3 Paige, 27; 1 Hare, 537; *Nickerson v. Bowly*, 8 Met. 424; *Rawlins's Trusts*, 45 Ch. D. 299; *Bishop v. McClelland*, 44 N. J. Eq. 450, 16 A. 1.

Whether the rule of implication applies to bequests as in devises, see 1 Ired. Eq. 45; 1 Jarm. Wills, 544; 3 Ves. 493; *supra*, 479-482. See further, Lord Westbury, in *Parker v. Tootal*, 11 H. L. C. 143, 161; *supra*, 557-559; *Butler v. Gray*, L. R. 5 Ch. 30. But cf. *Weeks, Re*, (1897) 1 Ch. 289; 6 H. L. C. 823. And see *Robinson v. Greene*, 14 R. I. 181; *Blake's Trusts*, L. R. 3 Eq. 799.

<sup>3</sup> 1 Jarm. Wills, 799-863, and numerous cases cited; *Foster v. Holland*, 56 Ala. 474; *Dale v. White*, 33 Conn. 294; 43 Md. 307; 83 Ky. 481, 4 Am. St. Rep. 160; 57 Conn. 295, 14 Am. St. Rep. 101, 18 A. 100; 116 Ind. 498, 19 N. E. 468; *Goebel v. Wolf*, 113 N. Y. 405, 10 Am. St. Rep. 464, 21 N. E. 388; 143 Ind. 248, 42 N. E. 623; 68 Fed. 796; *Smith v. Parsons*, 146 N. Y. 116, 40 N. E. 736; 64 Conn. 344, 30 A. 55; 81 N. E. 654, 196 Mass. 35; 45 So. 584, 153 Ala. 420; *Kountz's Estate*, 62 A. 1103, 213 Penn. 390, 3 L. R. A. (N. S.) 639; 78 N. E. 422, 192 Mass. 367, 116 Am. St. Rep. 246, 10 L. R. A. (N. S.) 1143; 67 A. 731; 60 S. E. 622, 108 Va. 67; 115 N. W. 342, 135 Wis. 60; 62 A. 730, 101 Me. 26; *Bosworth v. Stockbridge*, 75 N. E. 712, 189 Mass. 266 (income accumulation); 60 N. E. 116, 190 Ill. 47; *Carr v. Smith*, 57 N. E. 1106, 161 N. Y. 636. The addition of equivocal expressions to a gift first made in terms plainly vesting an immediate estate will not readily be accepted in a contrary sense. *Kimble v. White*, 50 N. J. Eq. 28, 24 A. 400; 478; 63 Vt. 391, 22 A. 630. Postponement in enjoyment as to income or capital does not prevent the vesting in interest. 2 Jarm. Wills, 799, 835, 837, and cases cited; *Monkhouse v. Holme*, 1 Bro. C. C. 300. See 129 Ind. 59, 28 N. E. 310; 9 Cush. 516; *Birdsall v. Hewlett*, 1 Paige, 32, 19 Am. Dec. 392; *Gifford v. Thorn*, 1 Stockt. 702; *Scott v. West*, 63 Wis. 529, 24 N. W. 161. Directions to sell or to pay and apply at a late period prescribed are consistent with a vested remainder. *De Vaughn v. McLeroy*, 82 Ga. 687, 10 S. E. 211; *Ingraham v. Ingraham*, 169 Ill. 432, 48 N. E. 561, 49 N. E. 320. In short, the law does not favor the abeyance of estates; but estates by way of remainder vest at the earliest period possible, unless the will shows a contrary intention. And vested interests liable to divestment are preferred in construction to interests contingent.

favor to vested interests nor theory should defeat the plain intention of the will in controversy. Nor can the absurd, inconvenient or illegal consequences of treating the interest as contingent and postponed prevent such a construction if the testator has clearly limited the estate in terms of contingency.<sup>1</sup>

563. **At what time beneficiaries should be ascertained** is an important point to consider. As vested interests, whether by way of remainder or otherwise, are preferred in construction to those which are contingent, so should the ascertainment of any class which is described in the will be referred to the earliest possible period consistent with a fair interpretation of that will.<sup>2</sup>

Words and expressions literally contingent in import, bend to this construction in favor of vesting the estate or interest, upon due regard for the whole scope and tenor of the will. 1 Jarm. Wills, 805; *Colt v. Hubbard*, 33 Conn. 281; *Brown, Re*, 154 N. Y. 496, 48 N. E. 890; 153 N. Y. 466; 47 N. E. 812; *Woodman v. Woodman*, 89 Me. 128, 35 A. 1037; 6 C. E. Green, 22; *Taylor v. Mosher*, 29 Md. 443; 117 Penn. St. 14, 11 A. 520; *Chafee v. Maher*, 17 R. I. 739; *ib.* 727, 24 A. 773, 742; 135 N. Y. 137, 31 N. E. 1008; *McCarty v. Fish*, 87 Mich. 48; 49 N. W. 513; *Kennard v. Kennard*, 63 N. H. 303 (vested and contingent remainder distinguished); *Lenz v. Prescott*, 144 Mass. 505, 11 N. E. 923; 31 Ch. D. 75; 15 R. I. 171, 2 A. 302 (legacies to be paid in one year); 117 Penn. St. 14, 11 A. 520 ("heirs"); *Woodman v. Woodman*, 89 Me. 128, 35 A. 1037 (uncertainty as to amount of property remaining over).

<sup>1</sup> 1 Jarm. Wills, 821-824; 3 Ves. 317; *Richardson v. Wheatland*, 7 Met. 171; *Wallace v. Minor*, 86 Va. 550. And see 2 T. R. 209; *Sears v. Russell*, 8 Gray, 86; *Donohue v. McNichol*, 61 Penn. St. 73; 67 Md. 465, 10 A. 74; 26 S. C. 450; *Benner's Will*, 113 N. W. 663, 133 Wis. 325; 53 S. E. 620, 141 N. C. 97; *Weil v. King*, 104 S. W. 380, 31 Ky. Law, 1010; *Francis, Re*, (1905) 2 Ch. 295; 61 A. 808, 212 Penn. 119.

A gift made expressly to take effect on a contingency or condition precedent will not arise unless the contingency happens; and, *per contra*, a vested gift is not divested unless all the events which are to precede the vesting elsewhere concert. Co. Lit. 219 b; 7 East, 269; 1 Jarm. Wills, 827.

If we consider our policy as favoring all the interests under a will as vested rather than contingent, the precedents are not so difficult to reconcile as their literal expression imports. See *Hawkins Wills*, 225, 232; *Lister v. Bradley*, 1 Hare, 12; 2 Mer. 363. And see *Phipps v. Ackers*, 9 Cl. & F. 583; 1 B. & P. N. R. 324; *Roome v. Phillips*, 24 N. Y. 465; 12 B. Mon. 117; *Stanley v. Colt*, 5 Wall. 119, 18 L. Ed. 502; 19 Wall. 167, 22 L. Ed. 109. And interests under a will may vest immediately upon the testator's death, subject to a possible divestment afterwards. *Neilson v. Bishop*, 45 N. J. Eq. 473, 17 A. 962; *Pickworth, Re*, (1899) 1 Ch. 642; *Field v. Peeples*, 180 Ill. 376, 54 N. E. 304. Equitable estates vest presumably at a testator's death; for equitable estates vest and descend like legal estates. *Bolton v. Bank*, 50 Ohio St. 290, 33 N. E. 1115; *McCarty v. Fish*, 87 Mich. 48, 49 N. W. 513.

<sup>2</sup> Thus, if the will gives to the testator's own heir, the gift vests naturally at the testator's own death; if to the heir of A, then at A's death; and in either case, as soon as there exists any one who answers the description of heir. 5 B. & Ad. 731; 1 Vern. 35; 2 Jarm. Wills, 62, 88; *Minot v. Tappan*, 122 Mass. 38. See *Moore v. Little*, 41 N. Y. 66; *Mortimer v. Slater*, 7 Ch. D. 322; 4 App. Cas. 448; *Whall v. Converse*, 146 Mass. 345, 15 N. E. 660; *Toner v. Collins*, 67 Iowa, 369, 56 Am. Rep. 346, 25 N. W. 287; 40 N. J. Eq. 443, 3 A. 260. See 43 Ch. D. 569 (nephews and nieces). This rule of presumption avails for gifts of personalty as well as real estate, so convenient is it to apply; and slight circumstances or mere conjecture that the testator meant otherwise should not induce the court to supersede it. *Boydell v. Golightly*, 14 Sim. 327; 14 M. & W. 214; *Campbell v. Rawdon*, 18 N. Y. 412; *Buzby's Appeal*, 61 Penn. St. 114; 5 Jones Eq. 267; *Abbott v. Bradstreet*, 3 Allen, 587; 128 Mass. 38 (a marked instance);

564. Such phrases as "dying without issue" show the influence of this same policy in favor of an early vesting, under modern construction. By the old rule, as applied to gifts of real and personal estate alike, the words "die without issue" meant *prima facie* an indefinite failure of issue; that is to say, not merely at the death of the person spoken of, but at any time afterwards.<sup>1</sup> But now, in devises or bequests these words and equivalent expressions, are construed often to mean *prima facie* a failure of issue at the death of the person whose issue are spoken of, and not an indefinite failure of issue.<sup>2</sup>

565. As concerning substitution and survivorship in the construction of a devise or bequest, there is still much discordance.

26 S. C. 561, 2 S. E. 412; Welch v. Brimmer, 169 Mass. 204, 47 N. E. 699; Grimmer v. Friederich, 164 Ill. 245, 45 N. E. 498; Scott v. West, 63 Wis. 529, 24 N. W. 161, 25 N. W. 18; 113 Ill. 637; 40 N. J. Eq. 443, 3 A. 260; 562. But if the will sets clearly in another direction, its lead must be followed. Wrightson v. Macaulay, 14 M. & W. 214; Donohue v. McNichol, 61 Penn. St. 73; 93 Tenn. 166, 23 S. W. 138; 8 Gray, 86; Evans v. Godbold, 6 Rich. Eq. 26. As to gift to the "heirs of A," see 3 Sandf. Ch. 67; Campbell v. Rawdon, 18 N. Y. 417; 2 Dev. Eq. 517, 27 Am. Dec. 238; 6 Ala. 36; 18 B. Mon. 370; 3 Rich. Eq. 158; Holloway v. Holloway, 5 Ves. 399. See as to "surviving," 565; 6 Rich. Eq. 26.

A devise or bequest to "next of kin" means also those *prima facie* who prove such at the death of the person whose next of kin are spoken of. 1 D. M. G. 502; Bullock v. Downes, 9 H. L. C. 1; 5 Hare, 557; Letchworth's Appeal, 30 Penn. St. 175; Brent v. Washington, 18 Gratt. 555; 5 Ves. 399; 4 K. & J. 498; Ware v. Rowland, 2 Phill. 635. Words of futurity alone do not exclude this presumption of immediate vesting, nor will it yield to doubtful conjecture. 16 Beav. 507; 17 Beav. 417; 3 East, 278; Rayner v. Mowbray, 3 Bro. C. C. 234. And see 9 H. L. C. 1; White v. Springeth, L. R. 4 Ch. 300; 4 K. & J. 483. But cf. the case of an annuity, 45 Ch. D. 453. As to the lapsing of legacies, see Exrs., *post*, 467. Cf. 44 Ch. D. 484.

<sup>1</sup> 8 Co. 86; 2 Atk. 313; Candy v. Campbell, 2 Cl. & F. 421; 2 Jarm. Wills, 497; Allen v. School Fund, 102 Mass. 262; Vaughan v. Dickes, 20 Penn. St. 509; Arnold v. Brown, 7 R. I. 188; 6 Cold. 479; Huxford v. Milligan, 50 Md. 542.

Other expressions were treated as equivalent in effect. Thus, "die without having issue." 13 C. B. 445; Vaughan v. Dickes, 20 Penn. St. 509. Or "die without children," so far at least as a devise of land was concerned; but not so readily in a bequest of chattels. 5 Bing. 243; 40 Penn. St. 18. As for "die without leaving issue," see 1 P. W. 663; 3 Paige, 30; 33 Md. 11, 3 Am. Rep. 171. Cf. where there was a gift over, etc., 3 B. & Ald. 546; 1 K. & J. 156; 18 N. H. 321; 2 My. & K. 441; 565.

<sup>2</sup> Such is the purport of Stat. 1 Vict. c. 626, § (1837). And see our several local codes. 4 Kent Com. 280. See also Phelps v. Phelps, 55 Conn. 359, 11 A. 596; Wills v. Wills, 85 Ky. 486, 3 S. W. 800; Weybright v. Powell, 86 Md. 573, 39 A. 421; 145 Penn. St. 540, 22 A. 972; 33 Conn. 290; Parish v. Ferris, 6 Ohio St. 563; 14 B. Mon. 663; Benson v. Corbin, 145 N. Y. 351, 40 N. E. 11; 92 Wis. 619, 66 N. W. 802; 16 Ga. 548. See Tilton v. Tilton, 196 Mass. 562, 82 N. E. 704 (set off of predecessor's debts). See further, 6 Mad. 250. "Die without issue living at the time of his decease" means a definite failure. Beckley v. Riegert, 61 A. 641, 212 Penn. 91. See "Die without leaving issue," in 40 Ch. D. 11. "Die without lawful issue," in Lewin v. Killey, 13 App. Cas. 783. See further, Andrews v. Rice, 53 Conn. 676, 5 A. 708; 65 Conn. 58, 31 A. 538; Dean v. Mumford, 102 Mich. 510, 61 N. W. 7; 489. But as to "from and after," see Jobson, R., 44 Ch. D. 154. And see 150 Mass. 225, 5 L. R. A. 690, 22 N. E. 65.

*Prima facie* the death of the testator is the time preferred.<sup>1</sup> Words of survivorship may, agreeably to the true intent of the will in its full scope, refer to the death of some party subsequent to the testator's own death.<sup>2</sup> But yet, after all, the better opinion must be, that the question to what period survivorship is to relate depends rather upon the apparent intention of the testator in each case, than upon any rigid rule, or any technical words.<sup>3</sup>

566. **As to joint or common tenancy**, either a devise or a bequest to several persons by name, or to a class, shall *per se* be presumed to create a joint tenancy among them.<sup>4</sup> This rule applies to children, issue, next of kin, and other classes of beneficiaries commonly found in a will; but not where the reference is to statutes of descent and distribution, and the right *per stirpes* enters plainly as an element of the gift.<sup>5</sup> Words which import distinctness of interest or equal division among the objects of the gift<sup>6</sup> will also exclude

<sup>1</sup> 8 B. & Cr. 231; 2 De G. J. & S. 437; 74 N. E. 980, 165 Ind. 200; Benner v. Williams, 73 N. E. 221, 71 Ohio St. 340; 25 Wend. 119; Ross v. Drake, 37 Penn. St. 373; Martin v. Kirby, 11 Gratt. 67; 5 Cush. 153; Davis v. Davis, 118 N. Y. 411, 23 N. E. 568.

<sup>2</sup> Crane v. Cowell, 2 Curt. 178; 563; 148 Mass. 576, 2 L. R. A. 448, 20 N. E. 165; 126 Penn. St. 562, 17 A. 870; Roundtree v. Roundtree, 26 S. C. 450, 2 S. E. 474. And see Bowman, Re, 41 Ch. D. 525; Pendleton v. Kinney, 65 Conn. 222, 32 A. 331.

<sup>3</sup> Denny v. Kettell, 135 Mass. 138; 45 N. J. Eq. 426; 114 Cal. 186, 45 P. 1063 (statute); Denton, Re, 137 N. Y. 428, 33 N. E. 482; Dent v. Pickens, 58 S. E. 1029, 61 W. Va. 488; Vance's Estate, 58 A. 1063, 209 Penn. 561. In some cases the reckoning of "survivors" as beneficiaries is taken to refer *prima facie* to the time of final distribution of the testator's estate, rather than the date of his death. See Cripps v. Walcott, 4 Mad. 11; Denny v. Kettell, 135 Mass. 137. And see 2 Jarm. Wills, 728-751; 137 N. Y. 428, 33 N. E. 482; 49 N. J. Eq. 44, 23 A. 497; Hawkins Wills, 245-254; 2 M. & K. 15, 23; Stevenson v. Fox, 125 Penn. St. 568, 17 A. 480, 11 Am. St. Rep. 922; 57 Conn. 154, 17 A. 90; 156 Penn. St. 197, 27 A. 375; 57 A. 167, 76 Conn. 522; 46 A. 497, 196 Penn. 366. As to "or" in a substituted gift, see Wingfield v. Wingfield, 9 Ch. D. 658; 25 Ch. D. 212; 151 Mass. 9, 23 N. E. 576; Delmar, Re, (1897) 2 Ch. 163 (alternative instead). As to gift over if beneficiary dies before testator, see 3 P. Wms. 113; 7 Paige, 336; 16 Beav. 56. See further, 47 A. 993, 198 Penn. 255; 84 N. W. 896, 108 Wis. 626; 77 N. E. 507, 190 Mass. 482.

Where successive limitations of personalty are made in absolute favor, the first in line of those who survive takes absolutely; for the effect of the failure of an earlier gift is to accelerate, not to destroy, the later gift, and the doctrine of repugnancy does not apply. Lowman, Re, (1895) 2 Ch. 348. Wherever a bequest is made personally to one as survivor of the testator it cannot take effect unless survivorship as a fact may be shown or legally presumed. See 102 N. Y. S. 808; Willbor, Re, 26 N. J. 26.

<sup>4</sup> 5 T. R. 562; Bullock v. Downes, 9 H. L. C. 1; 4 Bro. 15; Westcott v. Cady, 5 Johns. Ch. 334, 9 Am. Dec. 306; 2 Jarm. Wills, 251-266; 11 Beav. 485.

<sup>5</sup> Although the interests of members of the class vest at different times, the rule applies. 11 Hare, 196. It also applies to a gift to children by way of remainder after a prior life estate. 2 Jarm. Wills, 255; 1 Ch. D. 460. But not where some have a vested and others a contingent interest. 1 D. F. & J. 74.

<sup>6</sup> Such words as "equally," "among," etc. Eales v. Cardigan, 9 Sim. 384; 5 Binney, 18, 6 Am. Dec. 395; 2 Jarm. Wills, 258; 8 Pick. 520; 3 Desaus. 288.

the rule; and wherever the intent is manifest to create a tenancy in common, or co-ownership, that intent must prevail.<sup>1</sup>

566a. **Gifts to servants, strangers, etc.,** are sometimes considered.<sup>2</sup>

<sup>1</sup> See *supra*, 538-540. A testator's manifest intent will prevail. *Frost v. Courtis*, 167 Mass. 251, 253, 45 N. E. 687; *Moffett v. Elmendorf*, 752 N. Y. 475, 46 N. E. 845, 57 Am. St. Rep. 529; 65 Conn. 222, 32 A. 331; 117 N. C. 8, 23 S. E. 37.

The point of distinction here to be noted is, that in case of a joint tenancy, the failure of a devise or bequest as to any one of the parties named will carry the gift to the other or others by force of survivorship, that striking incident of the relation; but when, on the other hand, the gift is to tenants in common, the death of one of them before the testator, or the failure of his share from some other cause, will produce a lapse with the usual result in favor of heir, next of kin, or residuary devisee or legatee, as the case may be. If the gift vests at the testator's death, as where the gift is to objects as a class, each survivor takes his share, and the survivorship incident becomes exhausted. See 545, *supra*. The latest cases favor largely a tenancy in common by construction. 119 Mass. 509; L. R. 10 Ch. 360; 75 P. 53, 141 Cal. 432 (code); 67 N. E. 1084, 175 N. Y. 519 (code prefers tenancy in common); 60 N. E. 458, 26 Ind. App. 652; 49 A. 699, 23 R. I. 180; 45 A. 354, 72 Conn. 595, 45 A. 354; 71 N. E. 981, 186 Mass. 444; 72 N. E. 609 (Ind. App. not off. rep.).

As to a devise or bequest expressed to a husband and wife and another or others, see Co. Lit. 291; *Wylde, Re*, 2 D. M. & G. 724; 2 Jarm. Wills, 252. And see *Warrington v. Warrington*, 2 Hare, 54. See further, 5 App. Cas. 123; 39 Ch. D. 148; *Dixon, Re*, 42 Ch. D. 306. Whether "wife" includes one from whom legatee had been divorced, see 40 Ch. D. 30; *Bell v. Smalley*, 45 N. J. Eq. 478, 18 A. 70. And see 42 Ch. D. 54 (a second husband).

<sup>2</sup> Where a gift is made to one's servants without identifying particular persons as objects of the bounty, courts incline to limit its benefit if not to strict "household" servants, at least to such as spend their whole time in the master's employ; not extending the gift, in its scope, to persons who come back and forth for casual employment and work also for others. *Metcalf v. Sweeney*, 17 R. I. 213, 33 Am. St. Rep. 864, 21 A. 364; 2 Vern. 596; *Frazer v. Weld*, 59 N. E. 118, 177 Mass. 513. See also *Sharland, Re*, (1896) 1 Ch. 517; (1905) 2 Ch. 1.

For nephews defined "who may read law," see *Benson's Estate*, 169 Penn. St. 602, 32 A. 654.

Where a gift is made to a stranger in blood, it may be presumed that no right of representation as to heirs of that stranger is intended; and that where the residue of an estate is given, not to a class, but to two persons by name, one of whom is a stranger in blood, the death of that stranger before the testator, causes his share to lapse, regardless of his own kindred. *Horton v. Earle*, 162 Mass. 448, 38 N. E. 1135. Appropriate words in the will may, of course, rebut such a presumption.

Where one's will makes another (not the heir) the "sole controller" of all his property, this is presumed to mean "sole executor" only. *Wolffe v. Loeb*, 98 Ala. 426, 13 So. 744.

As to a church whose identity became lost through a consolidation, see 57 A. 860, 25 R. I. 628, 105 Am. St. Rep. 904.

## CHAPTER III.

## EXTRINSIC EVIDENCE TO AID CONSTRUCTION.

567. We are now to consider how far extrinsic evidence is admissible to aid in the construction and interpretation of wills. The maxim hardens into a truism, in modern times, that the written will must speak for itself, that the testament shall afford its own testimony. Hence, the modern interpretation of wills becomes subject to rules much the same as apply to written contracts; and eminent jurists assert that there is no material difference of principle between the two classes of writings, except what naturally arises from the different circumstances of the parties.<sup>1</sup> Yet in those differing circumstances appears no little ground of variance.<sup>2</sup>

568. Where, therefore, the language employed in the will is clear and of well-defined force and meaning, extrinsic evidence of what was intended in fact cannot be adduced to qualify, explain, enlarge, or contradict this language, but the will must stand as it was written.<sup>3</sup> To insert or substitute in effect that which the will never contained, our courts have stubbornly refused, and decline, to their honor, the insidious temptation of shaping men's wills for them.<sup>4</sup> Far safer is it, as they deem it, to adhere to general limits

<sup>1</sup> 1 Greenl. Ev. § 287.

<sup>2</sup> For here we find a formal instrument or instruments of disposition left as a sort of chart to all posterity, whose operation has no element of mutuality, whose maker cannot aid a court to discern his meaning, whose language and effect, however harsh, must remain immutable and unyielding. Interpretation consequently is thrown upon the judicial tribunal itself, which must hold the scales between the rival interests which this now irrevocable disposition has stirred up, and discharge a sacred duty both to the dead and the family and relations one leaves behind. In order to discharge these delicate functions safely and honorably, the court seeks therefore to put itself in the testator's place, and read, through his own surroundings, the disposition of property as he made it; to discover, not as in contracts, the meeting of two minds capable of modifying, explaining and rescinding together, but the process worked out and expressed by one individual mind and one will. It repels, however, on the one hand, the perilous discretion of framing another will; on the other, it shuns the equal danger of treating the instrument too much as though it were some generic thing, a document, a product, without an individual author. Hence this tender indulgence to the testator's wishes already commented upon, this straining to discern, through the mists of careless, untechnical, and ignorant expression, that pole-star of intention by which construction must be guided. And hence, too, as we shall now endeavor to show, the judicial inclination, when that intention remains obscured in spite of rule or presumption brought to bear upon the instrument by way of interpreting it, is to borrow light from extrinsic circumstances and illumine its meaning.

<sup>3</sup> 2 Stra. 1281; 5 B. & Ad. 64; 1 Jarm. Wills, 409; Wigram Wills, 5; Chambers v. Minchin, 4 Ves. 675; Canfield v. Bostwick, 21 Conn. 550; Brown v. Saltonstall, 3 Met. 426.

<sup>4</sup> See *supra*, 477.



prescribed by general rules.<sup>1</sup> And if written testimony *dehors* the will should be rejected from this point of view, much more should be that looser and less credible parol proof which is purely oral.<sup>2</sup>

569. In short, extrinsic evidence is incompetent to show the intention of a testator where the will speaks for itself with a clear and unambiguous meaning;<sup>3</sup> nor can it be received to show a different intention from that which the instrument discloses; nor can it enlarge or diminish by construction the disposition as written out and executed, or supply any omissions or defects which may have occurred through mistake or inadvertence.<sup>4</sup> That which a testator executes as his will must so operate, notwithstanding his mistake of law;<sup>5</sup> nor can it be set up from drafts, from contemporaneous memoranda, or even from the direct testimony of one's own scrivener or copyist, still less that loose hearsay which is always untrustworthy, that one mistook in fact what was written out.<sup>6</sup>

570. Nor is parol evidence to change rules of construction generally admissible where one's interest is at issue.<sup>7</sup>

<sup>1</sup> See Tindal, C. J., in 7 Bing. 279.

<sup>2</sup> Among early examples, see *Brown v. Selwin*, Cas. t. Talb. 240; 3 Ch. Rep. 98.

Generally speaking, words or a provision inadvertently omitted from a will cannot be supplied in construction. *Supra*, 216-218. Though what is superfluous by way of error may perhaps be expunged when the will is probated, so that the instrument may stand as what the testator supposed himself executing. *Supra*, 219, 220. Nor are plain words to be read differently or changed upon any plea, however capable of proof *aliunde*, that the testator meant different words; especially if the effect would be to alter essentially the disposition from that expressed in the instrument. *Wood, Re*, 32 Ch. D. 517; *Graham v. Graham*, 23 W. Va. 36, 48 Am. Rep. 364. And see 5 Mad. 364; *Defreese v. Lake*, 109 Mich. 415, 63 Am. St. Rep. 584, 32 L. R. A. 744, 67 N. W. 505; *Schlottman v. Hoffman*, 73 Miss. 188, 55 Am. St. Rep. 527, 18 So. 893; 101 N. C. 594, 8 S. E. 341. On the other hand a clerical error apparent from the context might be corrected in construction without the need of external proof at all. *Supra*, 527.

<sup>3</sup> *Mackie v. Story*, 3 Otto, 589, 23 L. Ed. 986; *Clark v. Clerk*, 2 Lea, 723.

<sup>4</sup> *Wilkins v. Allen*, 18 How. 385, 15 L. Ed. 396; *King v. Ackerman*, 2 Black, 408, 17 L. Ed. 292; *Sims v. Sims*, 94 Va. 580, 64 Am. St. Rep. 772, 27 S. E. 436. *Supra*, 214-220.

<sup>5</sup> *Supra*, 275.

<sup>6</sup> See *Frick v. Frick*, 82 Md. 218, 33 A. 462. One might have adopted some change by his copyist at the last moment before execution. What courts of construction can and will do, our two preceding chapters have indicated. They take the instrument as a whole and bring all parts, all provisions, together, and try to discover the general meaning without resort to any proof *aliunde*; they bend the lesser sense to the larger; and the intent thus discerned through the probated writing as a whole, aided by rules of presumption, shapes their interpretation of the instrument. If without other influences, other proof, a clear and unambiguous disposition is obtained, that disposition prevails; and should the testator's real intention be thereby frustrated, it is his own carelessly adopted or ill-chosen language that must answer for it.

<sup>7</sup> Presumptions, or the *prima facie* effect and meaning of detached words and phrases are controlled and modified readily enough by reference to the context and scope of the will without going outside the instrument at all, provided a clear conclusion is

571. It is the expressed intention of the testator, that which his will imports, and not any conjectural intention of his outside of the will which might or might not be capable of demonstration, that the court relies upon; and having ascertained that expressed intention to its satisfaction, the tribunal investigates no farther.<sup>1</sup>

572. All this scrutiny and comparison may leave the court nevertheless in doubt as to what the testator and the will intended upon some particular point in a given case; and hence, to resolve what is uncertain, but not to change or contradict what is plain, nor to substitute or insert new matter, the court admits extrinsic evidence of circumstances and surroundings in aid of the testator's meaning. And the object of such evidence is to put the court in the testator's place, and ascertain better what he intended.<sup>2</sup>

reached without external assistance. Words may be divested of their technical and literal force by this reference to the context. See *e.g.* *Lucas v. Brooks*, 18 Wall. 436, 21 L. Ed. 779. But the court does not travel beyond the context needlessly for that purpose; and its discretion not to be further instructed ought to suffice. *Thomas v. Lines*, 83 N. C. 191. No extraneous writing can be used to swerve the court from its usual course of reference to the will alone. See *Sullivan v. Winthrop*, 1 Sumn. 1. No extrinsic evidence, oral or written, to show that the testator habitually or when he executed that particular will, used words in some peculiar, inexact, or popular sense, can be adduced for diverting words and phrases from their apparent meaning or even for confirming the court in its opinion of what was truly intended; supposing of course that an appropriate gift is found in the will itself which makes good sense when applied to its surroundings. 4 Dow, P. C. 65; *Eberts v. Eberts*, 42 Mich. 404; 11 East, 441; *Shore v. Wilson*, 9 Cl. & F. 558; 4 Russ. 384; 2 Jarm. Wills, 417; *Baker's Appeal*, 150 Penn. St. 590. Not even can a revoked will be looked at to influence the construction of the unrevoked and operating one. *Hughes v. Turner*, 3 My. & K. 666. And see 90 N. C. 597, 619; 39 Ch. D. 155 (woman past the time of child-bearing). Cf. 470-472. And see *Benner's Will*, 113 N. W. 663, 133 Wis. 325; 190 N. Y. 128, 82 N. E. 1093; *Scott v. Scott*, 114 N. W. 881, 137 Iowa, 239; *Best v. Berry*, 75 N. E. 743, 189 Mass. 510, 109 Am. St. Rep. 651; *Bryan v. Bigelow*, 60 A. 266, 77 Conn. 604, 107 Am. St. Rep. 64; *Smart's Goods*, (1902) Prpb. 238; *Webb v. Hayden*, 65 S. W. 760, 166 Mo. 39; 51 A. 564, 74 Conn. 576, 92 Am. St. Rep. 235; 64 N. E. 345, 197 Ill. 398.

<sup>1</sup> Its conclusion may give words their technical or literal import, or may not; it may give expressions their ordinary and grammatical sense, or may not; but the meaning settled upon, if settled intelligibly, is that which the words and language of the whole will properly interpreted convey *per se*. Punctuation here has its use, though an ancillary one; and parentheses, stops, capital letters, and the like, may be taken into consideration when the will is not clearly interpreted otherwise. 1 Phill. 533; 2 Coll. 201; *Child v. Elsworth*, 2 D. M. & G. 679; 17 Beav. 591. But the bearing of such marks is circumstantial and not very positive; and punctuation of itself affords no ground for creating an ambiguity. See 25 Barb. 406.

<sup>2</sup> It is this senseless or uncertain situation of things which the present chapter is more especially to deal with. We inquire how far evidence of what were the testator's actual testamentary intentions may be adduced to remove a doubt, and make the will operate with sense and consistency. 68 A. 462, 74 N. H. 380; 113 N. W. 759, 136 Iowa, 165, 125 Am. St. Rep. 250; 68 A. 373, 80 Conn. 338; 106 N. W. 193, 129 Iowa, 686; 63 A. 835 (N. J. Eq.); *Shipley v. Mercantile Co.*, 102 Md. 649, 62 A. 814. Another consideration here occurs: that while a written will may speak sufficiently of the testator's purpose, that purpose has to be applied to definite persons and things. Doubt and uncertainty may arise out of this application of the gift, as in ascertaining sensibly the subject or object, or the interest given.

573. In the first place, and most positively, extrinsic evidence of intention<sup>1</sup> is admissible to determine which of two or more persons or things was intended under an equivocal description.<sup>2</sup>

574. Extrinsic evidence may likewise clear up a general uncertainty of description left in the will as to the thing given or the object of the gift, even though no alternative subject-matter or object is definitely presented at all.<sup>3</sup> And where, again, the description of the property or the person is partly wrong and partly right, but sufficiently right for a basis of identity.<sup>4</sup> And, generally speaking, where the gift is to a person whose surname or Christian name (but not both) is mistaken; or whose description is imperfect or not wholly accurate. For here *falsa demonstratio* is stricken from the will by construction, and extrinsic proof is sought to supply the full intent, not to change or create an intent.<sup>5</sup>

<sup>1</sup> Or parol evidence, as often called, using "parol" here simply to denote written or oral proof *dehors* the instrument.

<sup>2</sup> *Miller v. Travers*, 8 Bing. 244; *Wigram Wills*, 130. Instances in the reports under this head are numerous. As, for example, where a testator who made a bequest to "William Reynolds, one of my farming men," had in fact two persons of that name in his employ. *Reynolds v. Whelan*, 16 L. J. Ch. 434. And where the devise was to "John Cluer," and both father and son bore that name. *Jones v. Newman*, W. Bl. 60. And see *Morgan v. Morgan*, 1 Cr. & M. 235; *Gord v. Needs*, 2 M. & W. 129. And where a legacy was provided for the "Bible Society," there being more than one such society. *Tilton v. American Bible Society*, 60 N. H. 377, 49 Am. Rep. 321. And see *Gilmer v. Stone*, 120 U. S. 586, 30 L. Ed. 734 (testator a Presbyterian, who intended the gift for missions of his own faith). And evidence has been admitted to show that "my cousin Harriet Cloak" meant a cousin's wife, who bore that name, instead of a cousin whose Christian name was Harriet but whose surname had been changed by marriage. *Taylor, Re*, 34 Ch. D. 255.

<sup>3</sup> See an extreme English case where a scrivener mistook the name when the testator pronounced it in a low and feeble voice, and wrote incorrectly by the sound. *Beaumont v. Fell*, 2 P. Wms. 140 (legacy for "Gatty Yardley," written as "Catherine Earnly," who had no existence).

<sup>4</sup> *Still v. Hoste*, 6 Mad. 192.

<sup>5</sup> *Miller v. Travers*, 8 Bing. 244; 1 M. & S. 299; 1 P. Wms. 286; *Cox v. Bennett*, L. R. 6 Eq. 422. See 3 Ves. Jr. 306, doubted in *Wigram Wills*, pl. 131. A devise of land, correct in its general description, may be established by the correction upon extrinsic testimony as to what it describes in detail, or *vice versa*. *Pocock v. Reddinger*, 108 Ind. 573, 58 Am. Rep. 71, 9 N. E. 473; *Rogers v. Rogers*, 78 Ga. 688, 3 S. E. 451; *Lomax v. Lomax*, 75 N. E. 1076, 218 Ill. 629, 6 L. R. A. (N. S.) 942; *Sorenson v. Carey*, 104 N. W. 958, 96 Minn. 202; 156 Ill. 116, 47 Am. St. Rep. 181, 28 L. R. A. 149, 40 N. E. 553; 121 Ill. 341, 12 N. E. 750. Cf., as to erroneous description, where the court will not go outside the will, 518. The principle in this latter class of cases is, that where there is, in the main, a sufficient description in the will to ascertain accurately what is devised or bequeathed, a part which is inaccurate may be stricken out as surplusage, but that nothing substantial shall be added to the will. *Tindal, C. J.*, in *Miller v. Travers*, *supra*. We have elsewhere mentioned other instances which are referable to the same head. *Moreland v. Brady*, 8 Or. 303, 34 Am. Rep. 581; *Black v. Richards*, 95 Ind. 184; *Drew v. Drew*, 28 N. H. 489; *Martin v. Smith*, 124 Mass. 111; *supra*, 516-519, and cases cited; 1 Ch. D. 61; 54 Penn. St. 245.

575. Comparison of the latest English and American cases brings out some points of difference.<sup>1</sup>

576. Direct evidence *dehors* the will appears admissible, therefore, to show the testator's intention: (1) Where the person or thing, the object or subject of the disposition, is described in terms which are applicable indifferently to more than one person or thing. (2) Where the description of the person or thing is partly correct and partly incorrect, and the correct part leaves something equivocal.<sup>2</sup> Or, perhaps, to take a broader view of the subject, extrinsic evidence of intention may be admitted wherever the instrument is insufficiently expressed or applied in terms so as to raise a doubt of the object or subject intended; and in order to give the disposition effect, that doubt must be cleared and the insufficiency supplied.<sup>3</sup>

<sup>1</sup> Later English precedents, dating from 1833, checked a growing disposition of the courts to admit parol proof of intention to correct a will, and took a conservative direction. *Miller v. Travers*, 2 Bing. 244; *Oxenden v. Chichester*, 4 Dow, P. C. 65; *Newburgh v. Newburgh*, 1 M. & Sc. 352; *Hiscocks v. Hiscocks*, 5 M. & W. 363. These decisions preceded the Statute of Victoria. *Supra*, 252, 253. And see *Wigram Wills*, pl. 149-179. In *Beaumont v. Fell*, 2 P. Wms. 140 (much criticised) the court observed that the parol evidence would not have been admitted in a devise of lands, instead of a legacy of personalty. See 574.

American cases do not seem always so strictly to confine the instances of doubtful description as *Sir James Wigram and Hiscocks v. Hiscocks* incline. See *Doe v. Roe*, 1 Wend. 541. And it is held that if in a matter of description there is such a mistake that no one person or thing corresponds to the description in all particulars, but there is one who corresponds in many particulars, and no one other who can be intended, such person will take. *Tucker v. Seaman's Aid Society*, 7 Met. 188, *per* Shaw, C. J.; *Howard v. American Peace Society*, 49 Me. 288. Latent ambiguities, so called, are resolved by secondary proof of intention when the will's own language does not suffice, *Cotton v. Smithwick*, 66 Me. 360; 76 Me. 527; *Flannery v. Hightower*, 97 Ga. 592, 25 S. E. 371. And see 4 Paige, 271; 3 Watts, 385; 574, *supra*; *Allen v. Lyons*, 2 Wash. 475; *Winkley v. Kaime*, 32 N. H. 268. And so, too, to explain blind terms. 22 Wend. 148 ("backland"); *Black v. Hill*, 32 Ohio St. 313; *Brown v. Brown*, 106 N. C. 451, 11 S. E. 647 ("speculation lands"). And see *Dougherty v. Rogers*, 119 Ind. 254, 20 N. E. 779; *Scott v. Neeves*, 77 Wis. 305, 45 N. W. 421; *Jones v. Quattlebaum*, 31 S. C. 606, 9 S. E. 982; *Hawkins v. Garland*, 76 Va. 189 (legatee identified); *Taylor v. Tolen*, 38 N. J. Eq. 91; *Hastings, Re*, 6 Dem. 307; *Baird v. Boucher*, 60 Miss. 326 ("rent and personal"); 68 A. 373, 80 Conn. 338; 54 A. 484, 264 Penn. 397; 72 P. 502, 31 Wash. 643; 94 N. W. 447, 119 Iowa, 731; 49 S. E. 743, 121 Ga. 836, 104 Am. St. Rep. 185; *Wheeler's Will*, 57 N. E. 1128, 161 N. Y. 652; *Frick v. Frick*, 82 Md. 218 ("balance of estate"). Our courts liberally permit the rational intention of a testator to be aided by extrinsic evidence of what he meant, wherever the will as applied to a subject or object of description raises some doubt which, if not resolved, must cause the testamentary provision to fail for uncertainty or senselessness.

<sup>2</sup> *Miller v. Travers*, 8 Bing. 244.

*Sir James Wigram* appears to narrow the proposition down. *Wigram*, pl. 194. So, too, does the language of the court in *Hiscocks v. Hiscocks*, *supra*. But this is not justified by the precedents we have cited. See also *Northern's Estate, Re*, 28 Ch. D. 153. The policy being a just one, it should receive a just and liberal interpretation.

<sup>3</sup> On the other hand, such extraneous proof should be ruled out, whenever its tendency is to establish an intention different in essence from what the will expresses on its own face; for where admissible it is in aid of the testator's expressed intention,

577. **Reference to the context of the will itself** may often help clear an apparent uncertainty.<sup>1</sup>

578. **But extrinsic proof cannot aid to misconstrue** in such cases. Thus, a legacy plainly expressed to A or for a certain amount cannot be shown to apply to B instead, or for a different amount.<sup>2</sup> Hence parol evidence of intent cannot be admitted to supply possible omissions or defects in a will, occurring through mistake or inadvertence; nor should a court, for any assumed purpose of correcting the instrument by proof *aliunde* of what the testator actually intended, change a description which is wholly inapplicable to subject or object, as it stands written, into a corresponding gift, especially if the words are clear, and have a definite meaning and application of their own.<sup>3</sup>

579. **To aid construction in the context of the instrument** by extrinsic proof of the circumstances and situation of the testator when it was executed, is constantly permitted at the court's discretion, and this constitutes a proper, indeed, often an indispensable matter of inquiry. For, whatever a will may set forth on its face, its application is to persons and things external; and hence is admitted evidence outside the instrument of facts and circumstances which have any tendency to give effect and operation to the terms of the will; such as the names, descriptions, and designation of beneficiaries named in the will, the relation they occupied to the testator, whether the testator was married or single, and

not against it. In cases of this kind, moreover, the meaning of the testator's words is not usually ambiguous or obscure on the face of the will, but from some of the facts and circumstances admitted in proof an ambiguity arises as to applying the disposition which the will sets forth. The evidence adduced creates no gift but simply directs it.

<sup>1</sup> See *Morgan v. Morgan*, 1 Cr. & M. 235; *Gord v. Needs*, 2 M. & W. 129; 4 B. & A. 57. And see *Bennett v. Marshall*, 2 K. & J. 740 (plain "William" preferred to "William J. R. B."); *Lee v. Pain*, 4 Hare, 249 ("Miss" presumed the eldest daughter). Yet, parol proof of intention may be let in where the evidence from the context is not conclusive.

<sup>2</sup> See 8 Bing. 244; *Hiscocks v. Hiscocks*, 5 M. & W. 363; *supra*, 568.

<sup>3</sup> *Tucker v. Seaman's Aid Society*, 7 Met. 188. And see 8 Md. 507; 15 N. H. 317; 30 Penn. St. 425, 437; *Engelthaler v. Engelthaler*, 63 N. E. 669, 196 Ill. 230; *Union Trust Co. v. St. Luke's Hospital*, 67 N. E. 1090, 175 N. Y. 505; 77 S. C. 454, 58 S. E. 420; *Reynolds v. Reynolds*, 43 S. E. 878, 65 S. C. 390; 11 Johns. 201, 6 Am. Dec. 363; 3 Met. 429; *Woodruff v. Midgeon*, 46 Conn. 236.

Moreover, provisions apparently conflicting which are contained in the will itself, repugnant parts, and whatever ambiguity may arise directly from the face of the instrument and the expressions, must be resolved, if at all, by construction, and not by external proof of what was intended. *Tucker v. Seaman's Aid Society*, *supra*; 1 Johns. Ch. 231; *Lewis v. Douglass*, 14 R. I. 604; *Brearley v. Brearley*, 1 Stockt. 21. See *Hetley, Re*, (1902) 2 Ch. 866 (not to explain a power of disposition void for uncertainty). The patent contradiction in terms of a will may sometimes be rendered harmless by a generous construction, but never by parol extraneous proof of what was intended. *Lewis v. Douglass*, *supra*; 3 Post. 46.

who were his family, what was the state of his property when he made his will and when he died, and other like collateral circumstances. Such evidence being explanatory and incidental is admitted, not for the purpose of introducing new words or a new intention into the will, but so as to give an intelligent construction to the words actually used, consistent with the real state of the testator's family and property; in short, so as to enable the court to stand in the testator's place, and read it in the light of those surroundings under which it was written and executed.<sup>1</sup>

580. Hence, indirect evidence, or such as explains the testator's circumstances, habits, and manners, is frequently admissible. And even in cases where the stricter rule must exclude the testator's drafts, his instructions, and declarations, before or after the act of execution, of what he intended to give, evidence of extrinsic circumstances is not forbidden to aid in a just interpretation.<sup>2</sup> Such a distinction may seem a strange one; for this very proof of circumstances, especially when it leads closely up to the act of execution and its surroundings, may fall scarcely short of proving in fact what the testator actually meant, outside the written authentic expression of his last wishes. Nevertheless, the distinction is tenable, and much insisted on.<sup>3</sup>

<sup>1</sup> See 8 Rep. 155; Tindall, C. J., in *Miller v. Travers*, 8 Bing. 244; 4 Russ. 581 *Tucker v. Seaman's Aid Society*, 7 Met. 188; *Ladd v. Ladd*, 68 A. 462, 74 N. H. 380 *Blake v. Hawkins*, 98 U. S. 315; *Postlethwaite's Appeal*, 68 Penn. St. 477; 139 Mo. 456, 41 S. W. 238; 58 Kan. 438, 49 P. 527. See also *Wigram Wills*, pl. 59-95. Even the fact that the will was written out by the testator, he being an unprofessional man and unaccustomed to precise expression, has been thought not unworthy of consideration. 2 Bush, 171.

Parol evidence may be adduced for showing the state of the testator's property when he made the will. 1 Coop. 208; *Brainerd v. Cowdrey*, 16 Conn. 1; *Marshall's Appeal*, 2 Penn. St. 388; 108 Ind. 573, 58 Am. Rep. 71, 9 N. E. 473. Or to show the state of his family. 2 Jones Eq. 420; *Rewalt v. Ulrich*, 23 Penn. St. 388. Or other facts known to the testator which may reasonably be supposed to have influenced the particular disposition. 2 Pick. 243, 460; *Wootton v. Redd*, 12 Gratt. 196.

In pronouncing for a liberal admission of extrinsic facts and circumstances to aid in discovering the intention, Sir James Wigram strongly insists upon his distinction between the application of evidence to explain a testator's words, and its application to prove intention as an independent fact. *Wigram Wills*, pl. 76.

Among other considerations why extrinsic circumstances should be resorted to is the fact that the same words, properly interpreted, will often mean different things under different circumstances. *Wigram*, pl. 77. Agreeably to this doctrine, a court may look beyond the written will itself and be guided in its construction, not only where the object or subject of the gift is in dispute, but where the estate or quantity of interest given is not clear upon the face of the will. *Lowe v. Manners*, 5 B. & Ald. 917; 8 Bing. 244, 323; *Wigram Wills*, pl. 90. The will is often thus aided and reconciled in construction, though not, of course, contradicted; nor is such proof admitted at all if the simple writing be sufficiently understood without it. *Wells, Re*, 113 N. Y. 396, 10 Am. St. Rep. 457, 21 N. E. 137; *McGough v. Hughes*, 18 R. I. 768, 30 A. 851.

<sup>2</sup> See *supra*, 570, 573; *Patterson v. Wilson*, 101 N. C. 594, 8 S. E. 341.

<sup>3</sup> A court of construction is here constrained, where a court of equity with jurisdiction to correct mistakes might be invoked for greater latitude. Direct evidence of

581. Much has been said about latent and patent ambiguities in this connection; an expression borrowed from Lord Bacon, whose oft-quoted canon, though Wigram and other good English writers have disputed it,<sup>1</sup> the courts do not seem quite ready to discard.<sup>2</sup>

582. Extrinsic proof of custom or usage is admitted;<sup>3</sup> and deciphering or translating may be applied in case of need.<sup>4</sup>

583. A strong reason for admitting extrinsic proof of an explanatory sort in these exceptional instances of doubtful description is, that otherwise the gift must fail for want of a sufficient subject or object; that absurdity or nullity is the inevitable outcome of non-admission. A testator who has taken the pains to express his last wishes in writing most probably meant something; and to conclude that he intended a provision perhaps illegal or inoperative

intention alone, that which would prove intention as an independent fact, virtually repeals the wills act and supersedes the well-considered policy of our law; and it is against the admission of extrinsic testimony, to show independently what one intended, aside from what the will clearly expresses, that the line is drawn.

Many of our American cases are of less force as precedents, because they fail either to announce this distinction or to positively reject it. *Winkley v. Kaine*, 32 N. H. 268; 2 Wash. 475; 2 Dana, 47; 66 Me. 360. But the better opinion harmonizes with the doctrine long ago asserted in England, that where the language of the will is not ambiguous, but states clearly an intention, no extrinsic evidence is admissible to show a different and unexpressed meaning or intention on the testator's part. *Jackson v. Alsop*, 67 Conn. 249, 34 A. 1106, citing 9 Cl. & Fin. 355, 525; 587, *supra*. See *Grace v. Perry*, 95 S. W. 875, 197 Mo. 550; *Cheadle, Re*, (1900) 2 Ch. 620 (limited as to direct proof).

Extrinsic evidence is admissible as to circumstances of execution, upon such points as determining whether a doubtful paper was executed as a will. 277, *supra*. So, too, in explaining misdescription of its date. *Whiteman v. Whiteman*, 152 Ind. 263, 53 N. E. 225. And see 54 S. W. 138, (Tenn. Ch. App.) (whether devise was meant in fee or with limitations); *Noon, Re*, 90 P. 673, 49 Ore. 286.

Declarations of testator as to intent are not favored, especially if oral or offered to affect construction. *Sandon's Will*, 123 Wis. 603, 101 N. W. 1089; *Cochran v. Lee*, 84 S. W. 337, 27 Ky. Law, 64; 79 P. 585, 146 Cal. 77; 83 S. W. 469, 184 Mo. 346; 82 Md. 218, 33 A. 462.

<sup>1</sup> Wigram Wills, pl. 196.

<sup>2</sup> This canon regards ambiguities of words as of two sorts,—patent and latent; the one where the instrument appears ambiguous, the other where collateral matter out of the instrument breeds the ambiguity, since the instrument on its face appears certain enough. *Ib.*; Bac. Maxims, rule 23. In a patent ambiguity the written instrument, or higher proof, cannot be mingled in proof with the lower or oral, and must be construed by its own terms; but a latent ambiguity (which in truth grows out of the application of the language to facts and circumstances) is raised by matters parol, and hence may be fairly removed by the same means. *Ib.* Lord Bacon's illustrations were good, but practice carried the force of his rule beyond his own examples; and his distinction of patent and latent, though convenient in some respects can hardly serve as a criterion. See Wigram Wills, pl. 196–210, where various objections are stated. And see *e.g.* 99 N. W. 252, 71 Neb. 563; *Williams v. Williams*, 59 N. E. 966, 189 Ill. 500; 72 S. W. 694, 24 Ky. Law, 2031.

<sup>3</sup> *Supra*, 469; *King v. Mashiter*, 6 Ad. & E. 153.

<sup>4</sup> Wigram Wills, pl. 56; *Norman v. Morrell*, 4 Ves. 796; 9 Cl. & Fin. 502. And see *Kell v. Charmer*, 23 Beav. 195 (a jeweller's private price-marks explained to mean £100); *Hiscocks v. Hiscocks*, 5 M. & W. 363 (obscure terms explained); *Blair v. Scribner*, 67 N. J. Eq. 583, 591, 60 A. 211, 356.

is more natural than to conclude that he intended nothing at all. Hence, the anxiety of our courts to discern a rational meaning, if they can, in what the will bestows, rather than pronounce the disposition void for uncertainty, where any proof, not open to the fundamental objection against disputing solemn instruments in writing by parol evidence, is available.<sup>1</sup> In short, whatever devise or bequest may possibly be reduced to a certainty, or in substance identified as it was meant, without violating a cardinal rule of evidence, will be upheld.<sup>2</sup>

584. **Where a complete blank is left in the will for the name of a legatee or devisee, no parol evidence, however strong, is competent to fill it up;**<sup>3</sup> and the principle appears to be the same where the

<sup>1</sup> See *Standen v. Standen*, 2 Ves. Jr. 589; c. 2 *passim*, where this idea constantly changes the *prima facie* construction. The court interprets by the testator's familiar symbols, his habitual though perhaps obscure, imperfect, or inaccurate modes of expression. Thus, the mere misnomer of a legatee or devisee does not necessarily render the gift void. 1 Jarm. Wills, 380-383; 574 *supra*; 6 Ves. 42; 19 Ves. 381; *Cook v. Danvers*, 7 East, 299; *Smith v. Smith*, 4 Paige, 271; *Taylor v. Tolen*, 38 N. J. Eq. 91; 42 N. J. Eq. 43, 6 A. 280; *Gordon v. Burris*, 141 Mo. 602, 43 S. W. 642. Persons designated by their nicknames, or by words of misdescription originating in a nickname, or by their popular names or by some reputed name, or by some familiar term of endearment, may also be identified. *Lee v. Pain*, 4 Hare, 251; *Sutton v. Cole*, 3 Pick. 232; *Beatty v. Universalist Society*, 39 N. J. Eq. 452; *Queen's College v. Sutton*, 12 Sim. 551; *Vermont Convention v. Ladd*, 59 Vt. 5, 9 A. 1. Nor need a legatee be expressly named at all if oral proof of identity serves to connect him clearly with the gift which the will expresses. *Cheney v. Selman*, 71 Ga. 384 ("members of my family," or the "children of A"); *Hill v. Bowman*, 7 Leigh, 650; *Dennis v. Holsapple*, 148 Ind. 297, 62 Am. St. Rep. 526, 46 L. R. A. 168, 47 N. E. 631. Extrinsic evidence of facts and circumstances may clear a doubtful bequest to some society or corporation, especially a charitable one, whose name is not well described, thus identifying the proper recipient of the bounty. *Kilvert's Trusts*, L. R. 7 Ch. 170; *Hinckley v. Thatcher*, 139 Mass. 477, 52 Am. Rep. 719, 1 N. E. 840; 3 Demarest, 516; 49 Me. 288; 66 Me. 100; *Straw v. East Maine Conference*, 67 Me. 493; 7 Met. 416; *Gilmer v. Stone*, 120 U. S. 586, 30 L. Ed. 734; *Smith v. Kimball*, 62 N. H. 606; *Reilly v. Protestant Infirmary*, 87 Md. 664, 40 A. 894; 69 Conn. 416, 38 A. 219; 98 Ky. 349, 33 S. W. 86; *Dennis v. Holsapple*, 148 Ind. 297, 62 Am. St. Rep. 526, 46 L. R. A. 168, 47 N. E. 631. So, too, with the thing which is given, evidence of the circumstances may serve to identify the property and save the gift; as where, for instance, a certain section of land is devised without mention of the state or county. *Black v. Richards*, 95 Ind. 184. See *Wood v. Hammond*, 16 R. I. 98, 17 A. 324; 91 Iowa, 54, 26 L. R. A. 370, 58 N. W. 1093. And see *Anstee v. Nehms*, 1 H. & N. 225; 575 (a name reputed though incorrect); *Scott v. Neeves*, 77 Wis. 305, 45 N. W. 421 ("N's debt"). Upon the general subject of uncertainty in a gift, see next c.

<sup>2</sup> See *supra*, 516-518. A mistake in the locality of lands devised may often be aided by words of reference to occupancy, and *vice versa*, or other indentifying terms. 1 Jarm. Wills, 377-379; 1 Ld. Raym. 728. And so, too, where leasehold is described as freehold, etc. Scrupulous exactness of description is not needful, if identity under the will can be safely established, despite all error or imperfection in the will's expression. *Lytle v. Beveridge*, 58 N. Y. 592. *Asten v. Astin*, (1894) 3 Ch. 260, appears to go far in declaring void a devise of newly-built houses, not numbered; for in case of a block of such houses separately devised, it seems fair to treat such devisees as tenants in common of the whole block. See a misdescribed bequest of "stock," (1896) 2 Ch. 364. And see *Chappell's Goods*, (1894) P. 98; (1892) P. 83 (doubtful identity of executor or trustee).

<sup>3</sup> *Hunt v. Hart*, 3 Bro. C. C. 311. See next c.



blank relates to the subject or thing bequeathed or devised.<sup>1</sup> But partial blanks may, in a suitable case, be supplied in construction; not, perhaps, by direct parol evidence of what the testator intended, but, at all events, where the context, with or without the aid of extrinsic circumstances, supplies a definite thing or person, and renders the will sensible.<sup>2</sup>

585. In gifts to "children," "wife," etc., extrinsic evidence may be sometimes applied.<sup>3</sup>

586. Courts of equity have in some instances admitted parol evidence not only in the cases of fraud and error elsewhere considered,<sup>4</sup> but so as to establish or repel a resulting trust.<sup>5</sup>

587. The plain effect of language used in the will is not to be varied by external proof of what effect was really intended. If testamentary language in legal construction requires one interpretation, and can be understood in that sense, extrinsic evidence of

<sup>1</sup> To give "to — \$1,000" leaves, therefore, no one who can claim the legacy; and to give "to A B \$—" leaves nothing to be claimed as a legacy; and in either case the testator likely enough had never resolved upon a gift definitely, though turning it over in his mind, as to the subject or object. 8 Bing. 244; 2 Atk. 239; Taylor v. Richardson, 2 Drew. 16.

<sup>2</sup> Thus, a legacy to "Mr. B," or to "John," or to "Brown," might be identified; and so, too, where one legacy of \$500 was given to A, and another of \$700 to B, a third legacy of "600" to C might well be supposed to mean six hundred dollars. See 3 Ves. 148; De Rosaz, *Re*, 2 P. D. 66. But cf. as to defective sense, Mason v. Bateson, 26 Beav. 404; Traylor's Estate, 81 Cal. 9, 15 Am. St. Rep. 17, 22 P. 297; 592. And see Newburgh's Case, 5 Madd. 364; 216-219.

<sup>3</sup> Cheney v. Selman, 71 Ga. 584. See *supra*, 533, where primary and secondary meanings are stated. Such words as "son," "child," "daughter," etc., must usually be construed in the primary sense, unless that would make the will insensible and absurd. See (1894) 2 Ch. 83; Weatherhead v. Baskerville, 11 How. 329 (not sons alone, excluding daughters). Codes differ as to admitting evidence *dehors* the will, that one intended to disinherit a child. See Garraud's Estate, 35 Cal. 336; *supra*, 20, 480; Loring v. Marsh, 6 Wall. 337, 18 L. Ed. 802; Buckley v. Gerard, 123 Mass. 8; 3 Gray, 367; 106 Mass. 320; 5 Iowa, 196, 68 Am. Dec. 696.

In accordance with one's apparent intent, the designation "my wife" in a will may be shown to mean by extrinsic evidence the person with whom the testator lived and whom he held out as his wife, as against a lawful wife, long separated from him. Pastene v. Bonini, 166 Mass. 85, 44 N. E. 246.

<sup>4</sup> *Supra*, 216-220, 223, 248.

<sup>5</sup> Thus, where a devise or bequest is procured from the testator upon a promise to hold all or a part for some third person whom the testator desires to benefit, a trust arises upon the transfer which equity will enforce. Russell v. Jackson, 10 Hare. 206; Jones v. Badley, L. R. 3 Ch. 362; 9 Ves. 519; Glass v. Hulbert, 102 Mass. 24, 3 Am. Rep. 418; Hooker v. Axford, 33 Mich. 453; L. R. 4 H. L. 82. Cf. Wolford v. Herrington, 74 Penn. St. 311, 15 Am. Rep. 548. *E.g.* where the father devises to the youngest son, who promises as an inducement to this devise to pay £10,000 to the eldest son. 1 Jarm. 416. So, too, on the other hand, parol evidence *dehors* the will may be adduced to repel any such resulting trust: no such trust, of course, being expressed in the will or instrument of gift, but its effect being to sustain the legal title of donee, devisee or legatee against a naked equity which is raised by legal implication. 2 Story Eq. Jur. § 1202; Cas. t. Talb. 79; 9 Ves. 519.

intention cannot be adduced to give it another and a different interpretation.<sup>1</sup>

588. **We have assumed that the extrinsic evidence admitted, in the foregoing cases,** of whatever kind, whether directly or indirectly bearing upon the testator's actual intent, has been received, if at all, simply as ancillary and subordinate to the purpose disclosed in the written will, in order to aid a doubtful interpretation, and not so as to materially qualify or contradict the instrument or interpolate a testamentary gift which its own tenor did not justify. And were the question an open one in the courts, we should incline to contend that in the foregoing distinction is the real root of the matter, rather than in attempting to define positively between the admission or non-admission of direct proof of intention as against indirect proof of extrinsic facts and circumstances; for whether direct or indirect in bearing, all such proof is explanatory merely, under the limitations of our distinction, and all tends in the same direction, namely, to bring extrinsic evidence to bear upon the will, as to what the testator intended, when the will cannot shine by its own light unaided.<sup>2</sup>

589. **In fine, a court may inquire into every material fact and circumstance *dehors* the will** for the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by the will in controversy.<sup>3</sup> And the same holds true of every other disputed point respecting which it can be shown that in any way a knowledge of extrinsic facts will throw more light upon the testator's meaning.<sup>4</sup>

590. **As a bound, however, to all such extraneous investigation by a court of construction,** we may add that whenever the will discloses

<sup>1</sup> Wigram Wills, pl. 125; *King v. Badeley*, 3 My. & K. 417; 1 Keen, 309; *Wilkins v. Allen*, 18 How. 385, 15 L. Ed. 396; *supra*, 578, 580; *Erwin v. Smith*, 95 Ga. 699, 22 S. E. 712; *Forbes v. Darling*, 94 Mich. 621, 54 N. W. 385.

Extrinsic evidence is admissible in the probate to show that a gift by deed poll duly executed was intended as a will. *Slinn's Goods*, 15 P. D. 156.

<sup>2</sup> See *supra*, 575. Doubt and uncertainty may grow out of the thing described as given, or the person or object that shall take, or the language which imports the gift. Whatever the element or elements of uncertainty or senselessness, it is a rule that, where the words of the will itself, aided by extrinsic evidence of the material facts and circumstances, and by such direct proof of intent *dehors* the instrument as courts pronounce admissible, are found insufficient to determine the testator's meaning, the gift, the testamentary provision, will be void for uncertainty. Wigram Wills, pl. 105-129; 15 Sim. 626; 36 Iowa, 674, 14 Am. Rep. 538; 55 Ill. 514, 8 Am. Rep. 665; *Traylor's Estate*, *Re*, 81 Cal. 9, 15 Am. St. Rep. 17, 22 P. 297; next c. As where the gift is to the children of a deceased person named B, and there were three deceased persons of that name. *Stephenson, Re*, (1897) 1 Ch. 75.

<sup>3</sup> *Supra*, 579, 580; Wigram Wills, pl. 58; *Shore v. Wilson*, 9 Cl. & F. 556; 6 H. L. Cas. 106; *Innes v. Sayer*, 3 M. & G. 606.

<sup>4</sup> *Supra*, 582, 583; Wigram Wills, pl. 58.

a clear purpose upon its face, neither the situation of the testator, nor that of his family or property, nor any other outside facts or circumstances can properly be considered in giving effect to the will.<sup>1</sup> And certainly where doubt may be fairly solved by careful recourse to the context, and by bringing all parts of the will together, it is better not to travel outside the instrument at all.<sup>2</sup>

<sup>1</sup> *Brearley v. Brearley*, 1 Stockt. 21; *supra*, 468, 568.

<sup>2</sup> See the seven propositions of Sir James Wigram, which have largely moulded the later English precedents, as canons of construction. *Wigram Wills*, pl. 12-19.

## CHAPTER IV.

## MISCELLANEOUS PROVISIONS CONSIDERED.

591. **Concerning testamentary gifts insufficiently certain**, we have seen in former chapters with what tender indulgence the instrument of *post mortem* disposition will be carried into effect by construction, provided it fulfils all the formal conditions which are indispensable to a probate.<sup>1</sup> But after all the indulgence, all the favorable regard possible, after all the comparison of words and phrases, after the long search by the light of extrinsic testimony to discover in the gift a certain and sensible meaning, the court may still be left in impervious darkness, and the will must fail of effect in consequence.<sup>2</sup> Nevertheless, in modern times the instances of failure for uncertainty are more rare than formerly.<sup>3</sup>

592. **A gift by will to be certain requires a definite subject and object**, and cannot stand if either be wanting; though to identify the thing given, or the person to take, extrinsic evidence is generously admitted.<sup>4</sup>

<sup>1</sup> See *supra*, 572-590.

<sup>2</sup> Conjecture cannot be permitted to supply what the testator has failed to indicate. 1 Jarm. Wills, 356.

<sup>3</sup> This is partly because rules of construction are now better settled, and partly from the development of chattel wealth in our communities, and the decay of that ancient subservience to the heir-at-law, for whose sake the attempted devise of lands elsewhere was so often pushed aside on one pretext or another. The old cases of uncertain gift are of little value as precedents at this day. 1 Jarm. Wills, 357. See *supra*, 572-588.

<sup>4</sup> As to the subject, a gift of "some," or of an indefinite fund, is uncertain; yet the motive of the gift, if apparent, may reduce this to certainty by supplying the means of estimating its amount. 2 P. W. 387; *Jubber v. Jubber*, 9 Sim. 503; *Gray, Re*, 36 Ch. D. 205; 10 Sim. 193; 1 Jarm. Wills, 358. As to "all," cf. 1 Lev. 130; *Bassett's Estate*, L. R. 14 Eq. 54. Uncertainty which arises from two repugnant provisions may of course be reconciled by the usual rules. *Supra*, 478; 81 Ind. 224; 103 Ill. 607. The gift of part of a larger quantity is not uncertain where the devisee or legatee has a right to select. 2 P. W. 387; L. R. 1 Eq. 378; *Kennedy v. Kennedy*, 10 Hare, 438. A gift is good of what shall remain at the decease of the first taker, if the latter has only a life estate given him, or if such a gift is preceded by a power of disposition suitably restrained in its exercise. See *Surman v. Surman*, 5 Mad. 123; 1 De G. & S. 288; *Bibbens v. Potter*, 10 Ch. D. 733. But a blank in a will accompanied by an uncertain description is likely to prove fatal to the gift. 584, *supra*.

The uncertainty which avoids as to subject or object is that which either leaves the obscurity unaided in fine by proof from without, or confirms an inference that the testator had not really made up his own mind. *Supra*, 572-588. See 2 P. D. 72 ("one of my sisters to be executrix"). Cf. 3 K. & J. 206; 9 Hare, 37; *Gill v. Bagshaw*, L. R. 2 Eq. 746. Another ground for pronouncing the gift void in such cases might be the testator's apparent misconception; as where he gives a legacy to A's oldest son, and A never has a son, but daughters; though here it might instead be inferred that the gift

592a. By virtue of the *cy pres* doctrine, gifts for charity are largely sustained, under a sort of straining process applied in chancery, so as to avoid illegality or uncertainty.<sup>1</sup>

593. All particulars of description need not be accurate, provided enough remain to identify, after rejecting the false description and calling in such explanatory proof to help interpret the instrument as the rules of evidence permit.<sup>2</sup> And the rule is a general one, that no misdescription of the thing given or the taker shall defeat the gift, if upon the whole there is no reasonable doubt, consistently with the will's own expression, who or what was intended.<sup>3</sup>

was meant supposing A should ever have a son. The confusion of singular and plural in describing the object, the use of contradictory or repugnant words, gifts to several alternately or successively without specifying the order, these are among the various instances in which a devise or bequest has been adjudged void for uncertainty of object; and the fault is in the will, which becomes entangled in its own words so that a clear intention cannot be extricated from the expressions. 1 Jarm. Wills, 370-374. See *Whitesides v. Whitesides*, 28 S. C. 325.

<sup>1</sup> L. Fr. "As near as." See Bouv. Dict. "*Cy Pres*," 4 Ves. 14; 7 Ib. 69, 82. This doctrine and chancery jurisdiction, originating in England, obtains in some American States, while elsewhere discountenanced.

Independently of this *cy pres* doctrine, a trust under a will is liable to be declared void, though evidently for commendable and benevolent objects, for want of a certain designated beneficiary, for uncertainty and indefiniteness in its objects, and for excess of jurisdiction vested in the executors and trustees. See *Tilden v. Green*, 130 N. Y. 29, (1891), 27 Am. St. Rep. 487, 14 L. R. A. 33, 28 N. E. 880, where, by a bare majority, the New York Court of Appeals declared a trust void for uncertainty, whose primary object was to establish and maintain in New York City a free library on a noble and munificent basis. Legislative sanction after the testator's own death may be applied, within the time limited for the vesting of future estates. *Perry Trusts*, §§ 637, 736; *Inglis v. Sailors' Snug Harbor*, 3 Pet. 99, 7 L. Ed. 617; 43 N. Y. 254, 3 Am. Rep. 694. Cf. *Cruikshank v. Chase*, 113 N. Y. 337, 21 N. E. 64. Beneficiaries, in general, may be so described in the will as to be ascertained in the future when the right accrues to receive the gift, no rule of perpetuities being transgressed. *Keith v. Scales*, 124 N. C. 497, 32 S. E. 809. But, without the aid of the English *cy pres* doctrine, a grant which is dependent upon the selection by one's executors and trustees of the charitable, educational, and scientific purposes to which the fund shall be applied is ineffectual and void because of indefiniteness and uncertainty; and if evidence fails to identify a *cestui que* trust, the trust must fail. 124 N. C. 497; *Tilden v. Green*, *supra*. See *Crawford v. Forshaw*, 43 Ch. D. 643, sustaining such selection, under chancery supervision.

The precedents, and the English precedents especially, treat charitable bequests, therefore, with every possible indulgence, sustaining gifts in this respect which, were individuals the objects, must inevitably have failed. As in dividing between two charities of the same name. *Amb. 524*; 2 Beav. 81; *Alchin's Trusts*, L. R. 14 Eq. 230 (as a last resort); *Hare v. Cartridge*, 13 Sim. 167. See further, 25 Beav. 109; 7 Met. 188; 1 H. L. Cas. 778. But this distinction at least is observable: that in the gift to an individual or to some business corporation, a private or personal bounty was in the testator's view, while in gifts to religion, education, or other charities, the benefit bestowed is a public one; and to carry that public benefit into effect, if the scheme be feasible and can be gathered from the will, is, after all, the prime concern, the identity of the trustee or conduit of the testator's benevolence being but secondary in consequence. As to charitable trusts, see further, Exrs. 464, 465; *Perry Trusts*, § 687 *et seq.*; 1 Jarm. Wills, 209-250.

<sup>2</sup> *Supra*, 576.

<sup>3</sup> *Supra*, 516, 588; 78 N. C. 396. No gift can, in short, be pronounced void for uncertainty until after a resort to extrinsic evidence it still remains a matter of con-

594. Where the construction of a gift is doubtful after all extrinsic assistance is afforded, the leaning of the court should be to that course of disposition for which public policy pronounces in the statutes of descent and distribution; and this maxim may serve for particular words and phrases of uncertain tenor.<sup>1</sup> So, if equivocal description be not corrected by the context and parol evidence, but the name and description equally balance, either the gift must be divided; or, as some cases hold where no charitable purpose is disclosed, the gift fails altogether.<sup>2</sup>

595. Expressions of desire accompanying a devise or bequest are *prima facie* obligatory, and create a trust, unless the actual intention appears different.<sup>3</sup> Out of this rule grows the doctrine of precatory trusts, as they are called; and the test question in such trusts is whether by using words milder than a command the testator meant to control A B or to submit a proposed benefit to his discretion or selection instead.<sup>4</sup> For in this latter case the usual presumption is

jecture what the testator intended. *Congregational Society v. Hatch*, 48 N. H. 393; 4 Paige, 271; 57 Conn. 147, 17 A. 699.

<sup>1</sup> *France's Estate*, 75 Penn. St. 220; 80 Ib. 340. See *Cope v. Cope*, 45 Ohio St. 464, 15 N. E. 206; *Stephenson, Re*, (1897) 1 Ch. 75; *Nelson v. Pomeroy*, 64 Conn. 257, 29 A. 534.

<sup>2</sup> *Supra*, 592a; *Drake v. Drake*, 8 H. L. Cas. 172; 1 Jarm. Wills, 382.

To avoid a will or any of its provisions at the present day for uncertainty, it is not enough that the disposition appears too obscure and irrational for the testator to have been likely to intend it; but more than this, the gift must be without clear meaning at all. 2 Sim. & S. 295; *Wootton v. Redd*, 12 Gratt. 196; *Mostyn v. Mostyn*, 5 H. L. Cas. 155.

<sup>3</sup> 1 Jarm. Wills, 385; 2 Ves. 333; *Knight v. Boughton*, 11 Cl. & F. 513; 3 Beav. 148; 3 Mac. & G. 546; 2 Story Eq. Jur. § 1068; 15 Ohio St. 103; *Warner v. Bates*, 98 Mass. 274; 35 Me. 445; *Harrison v. Harrison*, 2 Gratt. 1, 44 Am. Dec. 365; 13 Penn. St. 253; 1 N. H. 217; 35 Vt. 173. Such gifts may be to A B for C D's benefit, etc.

Among expressions which have been treated as *prima facie* creating a precatory trust are these: "recommend," "request," "entreat," "advise," "confidence," "under the conviction that," "in full confidence that," "in full faith that," "not doubting," and even "hoping." *Hawkins Wills*, 159-162, and cases cited; 1 Jarm. Wills, 387; 93 Mo. 367, 3 Am. St. Rep. 544, 6 S. W. 239; *Colton v. Colton*, 127 U. S. 300, 32 L. Ed. 138. But a mere verbal expression ought not literally to determine, aside from the general scope and language of the will. See (1897) 2 Ch. 12; 72 N. E. 75, 186 Mass. 463.

<sup>4</sup> *Pennock's Estate*, 20 Penn. St. 268, 59 Am. Dec. 718; *Stead v. Mellor*, 5 Ch. D. 225. If such words are addressed to an executor, they are more clearly imperative. 66 Penn. St. 402.

In American States the English doctrine of precatory trusts is not always adopted with full force; and still less are our courts disposed to adhere to any artificial rule on this subject. See *Gibbins v. Shepard*, 125 Mass. 141; *Van Gorder v. Smith*, 99 Ind. 404; 100 Ind. 148; *Van Amee v. Jackson*, 35 Vt. 173; 20 Penn. St. 268, 59 Am. Dec. 718; *Burt v. Herron*, 66 Penn. St. 400; *Brasher v. Marsh*, 15 Ohio St. 103; *Howard v. Carusi*, 109 U. S. 725, 27 L. Ed. 1089; 37 N. J. Eq. 21; 86 Cal. 265, 24 P. 1028; 29 S. C. 54, 6 S. E. 902; where the precatory words were treated as amounting to mere recommendation. On the other hand, *Bigelow, C. J.*, in *Warner v. Bates*, 98 Mass. 274, pronounces the general principle of construction a sound one, and only open to criticism as courts have sometimes applied it in particular wills.

overcome, and the legatee may carry out the request or not as he chooses, and no trust is created.<sup>1</sup>

596. The question whether a trust is sufficiently created may also arise where the testamentary gift is made for some specified

<sup>1</sup> See 1 Sim. 542; *Webb v. Wools*, 2 Sim. N. S. 267. And see 60 Penn. St. 344 ("in trust"); *per curiam*, 127 U. S. 300, 312, 32 L. Ed. 138.

Mere expression of kindness and good will towards these third parties, or an appeal to the donee's liberality on their behalf, is not enough to create a trust for their benefit and make the dubious words alluded to operate to qualify the legatee's interest. *Bond, Re*, 4 Ch. D. 238; 11 Cl. & F. 513; *Sale v. Thornberry*, 86 Ky. 266, 5 S. W. 468. Doubtful cases may often be explained by the context; and where the words of the gift point plainly to a full, absolute and unfettered enjoyment by the donee himself, mere precatory expressions annexed to the gift can hardly be pronounced imperative. *Knight v. Boughton*, 11 Cl. & F. 513; 14 Sim. 379; *Meredith v. Heneage*, 10 Price. 306; *Hutchinson, Re*, 8 Ch. D. 540 (as to a widow and children); 113 Ind. 18, 14 N. E. 571; *Bills v. Bills*, 80 Iowa, 269, 20 Am. St. Rep. 418, 8 L. R. A. 696, 45 N. W. 748. See also 478, 600, as to repugnant conditions annexed to a gift; *Whitcomb's Estate*, 86 Cal. 265, 24 P. 1028. And see *Phillips v. Phillips*, 112 N. Y. 197, 8 Am. St. Rep. 137, 19 N. E. 411; *Enders v. Tasco*, 89 Ky. 17, 11 S. W. 818; *Clark v. Hill*, 98 Tenn. 300, 39 S. W. 339. Where, again, the testator obviously intends a gift subject to the beneficiary's discretion on certain points, that discretion must be respected. *Lawrence v. Cooke*, 104 N. Y. 632, 11 N. E. 144; 125 N. Y. 427, 26 N. E. 467.

There is a wide difference between a power under the will which the donee is free to exercise and a trust, which equity will enforce regardless of his wishes. *James, L. J.*, in *Lambe v. Eames*, L. R. 6 Ch. 599; 1 Russ. 509; 2 My. & K. 197; (1897) 2 Ch. 12; *Hamilton, Re*, (1895) 2 Ch. 370. But a trust may still be created out of precatory expressions, and enforced, where the trust itself is not illegal, where the supposed objects of the testator's bounty are certain and definite, the property clearly pointed out, and the natural relations of the testator to the beneficiaries such as to raise a strong motive for making a trust instead of confiding implicitly in the donee's discretion; and where, most of all, the strength of the language used by the testator besides warrants the inference that a decided, though soft, imperative was intended. *Cases supra*; 1 Jarm. Wills, 391; *Warner v. Bates*, 98 Mass. 274, and cases cited; *Colton v. Colton*, 127 U. S. 300, 32 L. Ed. 138; 113 Mo. 112, 35 Am. St. Rep. 699, 20 S. W. 786.

(1) *As to uncertainty of amount.* A gift to A, with precatory words as to disposing "what shall be left" at his death, or "the bulk" of the property, or what "he may save" out of income, serve as examples. *Hawkins Wills*, 164, citing 1 Bro. C. C. 179; 2 My. & K. 197; 10 Hare, 234. And see 1 Jarm. Wills, 396. A court of equity may measure the extent of interest in some such cases. *Wigram, V. C.*, in *Thorpe v. Owen*, 2 Hare, 610; 98 Mass. 274; 2 My. & K. 138.

(2) *As to uncertainty of objects.* See *Harland v. Trigg*, 1 Bro. C. C. 142. Cf. 10 Gill. & J. 159; 21 Conn. 259; 3 Mac. & G. 546. But see *Stead v. Mellor*, 5 Ch. D. 225; 125 N. Y. 427, 26 N. E. 467.

The words "wish," "desire," "will," and the like, expressed where the testator bestows without reference to acts of one or another beneficiary or of his fiduciary may be presumed to have an imperative sense. See 263, *supra*.

The issue of imperative or precatory may relate to some incident annexed to the gift. See *Ogden, Re*, 55 A. 933, 25 R. I. 378 (location of a monument).

On the whole, the test comes by taking precatory words and phrases in a just connection with the rest of the will and gathering the testator's probable intention from the whole instrument. *Clay v. Wood*, 153 N. Y. 134, 47 N. E. 274; *Colton v. Colton*, 127 U. S. 300, 32 L. Ed. 138; 49 N. J. Eq. 570, 25 A. 510; 172 Mass. 101, 51 N. E. 449, and cases cited. See *Putnam v. Safe Deposit Co.*, 83 N. E. 789, 191 N. Y. 166; *Wolbert v. Beard*, 107 N. W. 663, 128 Wis. 391; 64 N. E. 692, 182 Mass. 72; *McCurdy v. McCallam*, 72 N. E. 75, 186 Mass. 462 ("request"); 1 Cal. App. 80, 81 P. 752. Cf. (not imperative) (1904) 1 Ch. 549; 60 A. 694, 78 Conn. 4; *Angus v. Noble*, 46 A. 278, 73 Conn. 56; 106 S. W. 226, 32 Ky. Law, 408, 58 A. 24; *Rector v. Alcorn*, 41 So. 370, 81 Miss. 788; *Hillsdale College v. Wood*, 108 N. W. 675, 145 Mich. 257; *Williams v. Baptist Church*, 48 A. 930, 92 Md. 497; 54 L. R. A. 427, 43 So. 68.

purpose and without precatory words. Where the declared purpose of the gift is for the benefit of the donee and no one else, it is usually held that the gift is absolute notwithstanding, and that the donee may claim it without applying or binding himself to apply the money according to such purpose.<sup>1</sup> A stronger motive for inferring a trust arises when the specified purpose or motive of the gift is the benefit of another person or persons and not of the primary donee alone. Here the principles announced in considering precatory trusts must be applied, and the particular will subjected to its own natural interpretation.<sup>2</sup>

597. **Upon the whole, the introduction of precatory expressions into a will should be avoided, if possible, for it often sets third parties gaping for something more than any legatee's free discretion is likely to bestow upon them, and more too, as a matter of right perhaps, than the testator himself had ever dreamed they should receive; and out of the ill-feeling and disappointment comes litigation.**<sup>3</sup>

598. **A testamentary gift may be upon some condition precedent or subsequent; and to create such condition no particular form of words need be used, for if a corresponding purpose be read in the will, that purpose takes effect. Conditions in wills, as in other instruments, may be precedent or subsequent; in the one case, the**

<sup>1</sup> As if, for example, the legacy is specified to be given him to purchase a mill a life-annuity, a dwelling-house, to maintain and educate him, set him up in business, and the like. 1 Jarm. Wills, 397; 1 V. & B. 364; Knox v. Hotham, 15 Sim. 82; 16 Ib. 45; 9 Ib. 472; 28 Beav. 620. And see as to representative, Attwood v. Alford, L. R. 2 Eq. 479; 2 P. Wms. 308; 3 Ves. 305. As to such gift not immediate, see L. R. 8 Eq. 282. And see 11 Rich. Eq. 238; 11 S. C. 375; 148 Mich. 140, 11 L. R. A. (N. S.) 509, 111 N. W. 757. The principle which underlies these cases is that the gift vests absolutely in the donee, with a *jus disponendi* where a purpose is stated but not a positive condition of receiving. Yet here, as usual, the true scope of the gift and the testator's intention must be studied in the context. See as to interception of right through trustees, etc., Hatton v. May, 3 Ch. D. 148; L. R. 7 Ch. 727.

<sup>2</sup> One of these three constructions may be gathered from the particular context and circumstances: (1) that an imperative trust was intended; (2) or that the primary donee may freely exercise his own discretion as to the quantum of benefit to the other person or persons, provided his discretion be honestly exercised; (3) or that the expression of motive or purpose, being wholly nugatory, the primary donee's gift remains unabridged. See 1 Jarm. Wills, 399-404, and English cases cited; Lambe v. Eames, L. R. 6 Ch. 597; 35 Me. 445; 44 S. E. 174, 53 W. Va. 165; Loring v. Loring, 100 Mass. 340; 43 S. E. 643, 132 N. C. 227; 1 My. & Cr. 401; Crane's Will, 54 N. E. 1089, 159 N. Y. 557; 79 N. E. 1105, 187 N. Y. 524.

<sup>3</sup> No technical words are requisite for creating a trust if only the intention to do so be apparent in the instrument; and any donee or recipient of property may be adjudged a trustee thereof because of the obligations under which he takes it. 1 Jarm. Wills, 383, 405. Notwithstanding that the trust itself may fail by lapse or be condemned as illegal, a devise or bequest to a person merely by way of trust is not to be construed into an absolute gift. McHugh v. McCole, 97 Wis. 166, 65 Am. St. Rep. 106, 40 L. R. A. 724, 72 N. W. 631.



estate or interest does not vest until the condition is fulfilled; in the other, it is liable to be divested if the condition afterwards fails.<sup>1</sup> No criterion is afforded by the choice of technical expressions, but the probable intention of the testator must determine the construction in every case of this kind.<sup>2</sup>

599. Instances of conditions precedent or subsequent in a will occur not unfrequently in the reports.<sup>3</sup>

<sup>1</sup> "If," "on condition that," "provided," etc., are expressions here used, yet not indispensable. 2 Jarm. Wills, 1, 2. See *Stanley v. Colt*, 5 Wall. 119; *Denby, Re*, 3 De G. F. & J. 350; *Porter, Re*, L. R. 2 P. & D. 22; *Skipwith v. Cabell*, 19 Gratt. 758. And see *supra*, 285-290, as to conditional or contingent wills. Words of mere description or inducement are insufficient. See 4 Jones L. 249; *Ditchey v. Lee*, 78 N. E. 972, 167 Ind. 267, where "condition" was held to mean "consideration" merely.

<sup>2</sup> 4 Kent Com. 124; *Finlay v. King*, 3 Pet. 346, 7 L. Ed. 701. As to condition annexed to a joint gift, see *Rockwell v. Swift*, 59 Conn. 289, 20 A. 200; *Hayes v. Davis*, 105 N. C. 482, 10 S. E. 912. A condition in a will may be valid, notwithstanding no gift over is expressed.

<sup>3</sup> As to conditions precedent, see *Davis v. Angel*, 31 Beav. 223; 4 De G. F. & J. 524 (marriage); 15 Ves. 248; *Randall v. Payne*, 1 Bro. C. C. 55; 1 P. W. 284; 1 Sch. & L. 1; *Marston v. Marston*, 47 Me. 495; *Minot v. Prescott*, 14 Mass. 495; *Merrill v. Female College*, 74 Wis. 415, 43 N. W. 104 (changing name, etc.); 51 S. E. 789, 139 N. C. 13; 41 S. E. 510, 63 S. C. 474; 60 N. E. 110, 190 Ill. 200; 57 S. W. 110, 156 Mo. 413 (waiver of condition). See also 20 N. J. Eq. 43, 218; *Caw v. Robertson*, 1 Seld. 125; 10 Watts, 179; *Nevens v. Gourley*, 97 Ill. 365.

As to conditions subsequent, see 1 Vern. 78; 2 P. Wms. 626; *Lloyd v. Branton*, 3 Mer. 108; 2 M. & Gr. 8; *Tilden v. Tilden*, 13 Gray, 103 (keep house in good repair); *Smith v. Jewett*, 40 N. H. 530 (educating some one). And see 113 F. 609; 64 Neb. 563, 90 N. W. 560; 10 Pick. 306; *Hogboom v. Hall*, 24 Wend. 146; *Lindsey v. Lindsey*, 45 Ind. 552; 41 Mich. 409, 1 N. W. 1048; 3 Woods C. C. 443; *Morse v. Hayden*, 82 Me. 227, 19 A. 443; 79 Wis. 557, 48 N. W. 661.

An estate is presumed to vest on the testator's death, rather than at a later date. Hence, if no intention to defer the period of vesting definitely appears, while a definite date for performing the condition after the testator's death appears, or if there appears a vesting as usual, though upon probation, a condition subsequent rather than precedent may be inferred. The condition subsequent better fits the adaptation of the will to peculiar and unforeseen exigencies which may arise after it has passed out of its maker's control; for a court of equity may, and frequently does, relieve the donee from embarrassing conditions which turn out harsh, impossible, and unconscionable; but to vest an interest in any one clear of its condition precedent, no matter how unjust or incapable of performance that condition may prove, is beyond the scope of its authority. 2 Jarm. Wills, 9; Co. Lit. 206 b; 16 Sim. 476; *Marston v. Marston*, 47 Me. 495; 4 Kent Com. 124, 125; 4 De G. F. & J. 524; 29 Vt. 273; 13 B. Mon. 163, 56 Am. Dec. 557; *Roundel v. Currer*, 2 Bro. C. C. 67; 100 Wis. 633, 76 N. W. 600; *Morse v. Hayden*, 82 Me. 227, 19 A. 443. And see 50 S. E. 218, 137 N. C. 572; 104 N. W. 299, 95 Minn. 340; *Croxon, Re*, (1904) 1 Ch. 252; *Kuhn's Estate*, 52 A. 126, 203 Penn. 17; 60 N. E. 500, 190 Ill. 283; 27 So. 705, 52 La. Ann. 1122; 98 F. 495 (death of beneficiary); 96 Va. 81, 70 Am. St. Rep. 825, 30 S. E. 462. The acceptance of a gift compels one to comply with the condition annexed to it; and the parties injured by his non-compliance are not without redress in law or equity. *Tilden v. Tilden*, 13 Gray, 103. But forfeiture is not readily declared whenever compensation in damages can be made in full of the injury. *Smith v. Jewett*, 40 N. H. 530; 2 Story Eq. Jur. §§ 1315, 1319; *Cunningham v. Parker* 146 N. Y. 29, 48 Am. St. Rep. 765, 40 N. E. 635.

Conditions subsequent are construed beneficially in order to save, if possible, the vested estate or interest; and the property, if relieved of the condition, becomes absolute in effect. 35 Beav. 312; *Hervey-Bathurst v. Stanley*, 4 Ch. D. 272; *Conrad v. Long*, 83 Mich. 78; 75 Ill. 315; 4 Kent Com. 130; *Greenwood, Re*, (1903) 1 Ch. 749

600. As to the time required for performing or fulfilling a condition precedent or subsequent, this should be that period which the will prescribes, if the testator clearly expresses or indicates his wishes; otherwise, a just and reasonable time, as the nature of the case and a fair construction of the instrument may import.<sup>1</sup> But conditions may be pronounced void when clearly repugnant to the gift to which they are annexed.<sup>2</sup> It comes, in fine, to a matter of rational construction; and the general intention discoverable in the will, regarded as a consistent whole, should prevail.<sup>3</sup>

601. Restriction upon alienation is one of the special conditions to be found in wills, by way of restricting, qualifying, or limiting the gift. Out of favor to the devisee of lands, many cases,

(impossible of performance). See 71 N. E. 80, 185 Mass. 560, 102 Am. St. Rep. 363; *Parker v. Parker*, 123 Mass. 584; *Shepard v. Shepard*, 57 Conn. 24, 17 A. 173. On the other hand, a condition precedent, impossible either in its creation or under the existing circumstances, or illegal, carries down in its defeat the gift whose vesting depended upon it, though the donee himself be blameless. 3 Bro. C. C. 67; *Boyce v. Boyce*, 16 Sim. 476; 97 N. C. 295, 2 S. E. 450. And see *Stickney's Will*, 85 Md. 79, 60 Am. St. Rep. 308, 35 L. R. A. 393, 36 A. 654 (residuary bequest); 2 De G. & S. 49; 2 Jarm. Wills, 9-13. As to accepting the equivalent of a contingency see *McFarland v. McFarland*, 177 Ill. 208, 52 N. E. 281.

A condition may be void for uncertainty in expression.

<sup>1</sup> 2 Jarm. Wills, 7, 8; *Gulliver v. Ashby*, 1 W. Bl. 607; 2 Met. 495; 54 Me. 291; *Ward v. Patterson*, 49 Penn. St. 372. Cf. as to lifetime, *Finlay v. King*, 3 Pet. 346, 7 L. Ed. 702. As against the rigid prerequisites of the will in respect to time, equity is powerless. As where the conditional donee was abroad, and did not know of the condition precedent until it was too late to choose whether to perform or not. 3 Mer. 7; *Powell v. Rowle*, L. R. 18 Eq. 243; *Hartley, Re*, 34 Ch. D. 742. But the court may lay hold of other incidents, such as the failure to declare a gift over on non-performance, and thus wrest a reasonable extension of the donee's opportunity to perform out of the will's imperfect and not prohibitive expression. See *Hollinrake v. Lister*, 1 Russ. 500; 79 Wis. 557, 48 N. W. 661; *Cunningham v. Parker*, 146 N. Y. 29, 48 Am. St. Rep. 765, 40 N. E. 635. See also *Page v. Whidden*, 59 N. H. 507.

<sup>2</sup> As when, for example, a testator, after plainly devising lands in fee, proceeds to declare some restraint by way of proviso incompatible with one's right of full dominion. Co. Lit. 206 b; *Willis v. Hiscox*, 4 My. & C. 201; *Zillmer v. Landguth*, 94 Wis. 607, 69 N. W. 568; *Elliot, Re*, (1896) 2 Ch. 353. Cf. 601, 602, *post*. That a plain and absolute gift of personalty is not to be controlled and qualified by conditions totally repugnant to the interest given and its incidents follows as of course. 2 Jarm. Wills, 19; 35 N. Y. 350; 1 Coll. 441; 23 Beav. 388; *Pearson v. Dolman*, L. R. 3 Eq. 320; *Moore, Re*, 39 Ch. D. 116; 105 N. W. 161, 328; 128 Iowa, 416, 643, 1 L. R. A. (N. S.) 142; 61 A. 1106, 212 Penn. 564; 53 A. 824, 64 N. J. Eq. 16; 108 Cal. 628, 49 Am. St. Rep. 97, 41 P. 772; *Mulrane v. Rude*, 146 Ind. 476, 45 N. E. 659. Cf. *Lupton, Re*, (1905) P. 321. If a gift of income be absolute, conditions annexed by the will to the principal do not control the income. *McElwain v. Congregational Society*, 153 Mass. 238, 26 N. E. 692. But a gift, absolute by the will, may be made conditional by some codicil thereto. *Hughes v. Hughes*, 91 Wis. 139, 64 N. W. 851. And see *supra*, 478, 518.

<sup>3</sup> While repugnant conditions or clauses must be stricken out in effect, nothing should be pronounced repugnant which amounts to a legal and proper qualification of the terms under which the gift is bestowed. But public policy may perhaps constitute an element in such cases besides; as where an impossible, illegal, or impolitic condition subsequent being rejected, the gift stands absolute. *Supra*, 562, 599.

and especially the older ones, insist very strongly upon the controlling force of technical words which import a fee, so as to discard peremptorily whatever words of qualification may follow, on the theory that a repugnant condition is attempted, which in consequence must be utterly void.<sup>1</sup> In truth, however, the question is mainly one of intent under the particular will; and courts stand up for justice and public policy when interpreting a will, and make the construction conform if possible.<sup>2</sup>

602. **Some have denied this whole doctrine of the testator's right to restrain** even for a day the power of alienation; and yet that the testator's general right to hinder the unfettered disposal of what he gives by way of bounty to another exists in some sense can hardly be questioned.<sup>3</sup>

603. **As to the condition in restraint of marriage, we find numerous and subtle distinctions** drawn out, all of which originate in the rule of the civilians that conditions, precedent or subsequent, in general restraint of marriage, although accompanied by a gift over,

<sup>1</sup> Co. Lit. 223a: *Tibbits v. Tibbits*, 19 Ves. 656; *Nourse v. Merriam*, 8 Cush. 11.

<sup>2</sup> Conceding that a restraint upon alienation is *per se* repugnant to an estate in fee or an absolute gift of any kind, it does not follow that such a condition must always be rejected as repugnant; for the context may show that this restriction or qualification was of the very essence of the devise or bequest, and that no fee, no absolute gift, was contemplated at all, but a qualified gift, obnoxious in no respect to the law or public policy.

<sup>3</sup> *Mandlebaum v. McDonnell*, 29 Mich. 78, 18 Am. Rep. 61. See *Rosher v. Rosher*, 26 Ch. D. 801; 2 Dr. & S. 117; *Shaw v. Ford*, 7 Ch. D. 669; L. R. 20 Eq. 189; 4 My. & C. 201; *Freeman v. Phillips*, 38 S. E. 943, 113 Ga. 589; 52 S. W. 1028 (Tenn. Ch. App.). One cannot incur alienation of what he has technically given in fee. *Zillmer v. Landguth*, 94 Wis. 607, 69 N. W. 568; *Potter v. Couch*, 141 U. S. 296, 315, 35 L. Ed. 721, 732; 29 Mich. 78, 18 Am. Rep. 61; 35 N. Y. 340, 617; *Todd v. Sawyer*, 147 Mass. 570, 17 N. E. 527; *Allen v. Craft*, 109 Ind. 476, 9 N. E. 919, 58 Am. Rep. 425; *Anderson v. Cary*, 36 Ohio St. 506, 38 Am. Rep. 602. As to restraints upon a gift of personalty, see *supra*, 557-559; *Churchill v. Marks*, 1 Coll. 441; *Shaw v. Ford*, 7 Ch. D. 669; 1 Ch. D. 229; 29 Beav. 216; *Hill v. Downes*, 125 Mass. 506; *Dugdale, Re*, 38 Ch. D. 176; 113 Ind. 18, 14 N. E. 571; *Porter, Re*, (1892) 3 Ch. 481.

Whether in realty or personalty, the true principle of rejecting the repugnant condition of a gift appears to be that, technically speaking, an absolute estate or interest has under the language of the will vested sufficiently in the devisee or legatee; and having so vested, and in the case of personalty having vested moreover in the legatee's own possession and dominion, any further qualification upon the donee's absolute dominion over the property or upon its legal devolution must be inconsistent with the gift and consequently void. Yet the testator's intention to qualify reasonably what he chooses to bestow is not incapable of taking effect when not contrary to law; and as elsewhere shown, a devise or bequest absolute in terms may be modified in effect by other clauses of the will, so as, for instance, to cut down what appears a fee to a life estate, and otherwise restrict the gift in accordance with the testator's meaning, though not so as to violate his intention. *Supra*, 559; *Cotgrave, Re*, (1903) 2 Ch. 705; *Wallace v. Smith*, 68 S. W. 131, 24 Ky. Law, 139; *Broadway National Bank v. Adams* 133 Mass. 170, 43 Am. Rep. 504; 606, *post*.

derogate from public policy and are void.<sup>1</sup> As an Anglo-Saxon doctrine the rule finds important modifications.<sup>2</sup>

<sup>1</sup> 2 Jarm. Wills, 50; 9 East, 170; *Jones v. Jones*, 1 Q. B. D. 279 (devise); *Bellairs v. Bellairs*, L. R. 18 Eq. 510.

<sup>2</sup> A condition in palpable and unqualified restraint of marriage, and to promote celibacy, is indeed void; and public policy is violated whether the testator's object was to induce pure or impure celibacy, and whether he meant to restrain marriage or made a gift whose natural operation is to restrain, without clearly intending that it should so operate. *Allen v. Jackson*, 1 Ch. D. 399; *Bellairs v. Bellairs*, *supra*; *Cornell v. Lovett*, 35 Penn. St. 100; *Jones v. Jones*, 1 Q. B. D. 279. More especially, where the general restraint upon a legatee's marriage is imposed by a testator who has no interest therein. *Maddox v. Maddox*, 11 Gratt. 804; 2 Jarm. Wills, 44; *Reynish v. Martin*, 3 Ark. 330.

On the other hand, a condition that one's widow shall not marry again is in modern times universally upheld as valid. *Allen v. Jackson*, 1 Ch. D. 339; 35 Penn. St. 100; *Hibbits v. Jack*, 97 Ind. 570, 49 Am. Rep. 478; 91 Ind. 266, 46 Am. Rep. 598; 24 Ch. D. 362; *Martin v. Seigler*, 32 S. C. 267, 10 S. E. 1073; *Herd v. Catron*, 97 Tenn. 662, 37 S. W. 551, 37 L. R. A. 731; 108 Tenn. 505, 68 S. W. 250; *Newton v. Marsden*, 2 J. & H. 356 (bequest not by husband). Our law puts the remarriage of a widower on the same ground, and permits gifts with corresponding condition to stand. *Allen v. Jackson*, and *Cornell v. Lovett*, *supra*. Conditions of this kind are presumed to mean marriage after testator's death and not before. 74 Law J. Ch. 331. See further, *Harlow v. Bailey*, 75 N. E. 259, 189 Mass. 208; 62 A. 456, 70 N. J. Eq. 572; *Holbrook's Estate*, 62 A. 368, 213 Penn. 93, 110 Am. St. Rep. 537, 2 L. R. A. (N. S.) 545. Nor is a partial restraint upon marriage void; such as a condition to marry or not marry with the consent of some one specified; or to marry or not marry an individual or one of a class of individuals; or to marry or not marry with prescribed ceremonies or under fair restrictions as to time, place, age, and other circumstances. *Dashwood v. Bulkeley*, 10 Ves. 230; 44 Ch. D. 654; *Whiting's Settlement*, (1905) 1 Ch. 96; *Graydon v. Graydon*, 23 N. J. Eq. 229; 1 Vern. 19; 62 A. 456, 70 N. J. Eq. 572; *Hodgson v. Halford*, 11 Ch. D. 959; 16 Ch. D. 188; *Phillips v. Ferguson*, 85 Va. 509, 17 Am. St. Rep. 78, 1 L. R. A. 837, 8 S. E. 241; 1 Moll. 611; 30 W. Va. 171, 3 S. E. 597; 1 Jarm. Wills, 44. Cf. (1904) 1 Ch. 120, 431. Supposing, of course, that all such particular conditions are *bona fide*, that compliance or non-compliance therewith is from the nature of things practicable, and that nothing irrational, no violation of policy in other respects, is involved in a gift so qualified. 2 Jarm. Wills, 45-50.

Another modification of the rule, which leads to some unsatisfactory distinctions, and yet has reason and Roman precedent on its side, is this: that a bequest during celibacy, a *bona fide* provision for one's maintenance while unmarried, and especially for a legatee who had a more natural claim upon the testator's bounty as a single person than if married, will be upheld. The distinction does not hold in gifts of real estate. *Jones v. Jones*, 1 Q. B. D. 274; 3 D. M. & G. 954; *Cornell v. Lovett*, 35 Penn. St. 100. And so, too, a gift of income or support to A, for life, or "as long as she remains my widow," or "during widowhood," is less obnoxious than a gift which annexes the condition against re-marriage peremptorily, and may be upheld more confidently; for this is a limitation to one's bounty on sensible grounds rather than a penalty by way of condition. *Summit v. Yount*, 109 Ind. 506, 9 N. E. 582; *Knight v. Mahoney*, 152 Mass. 523, 9 L. R. A. 573, 25 N. E. 971; *Brotzman's Appeal*, 133 Penn. St. 478, 19 A. 564; 124 N. C. 51, 32 S. E. 377. As to gift over in such a case stated to be on the wife's death, see *Tredwell, Re*, 2 Ch. (1891) 640; (1899) 1 Ch. 63 (legatee provided for in any event). See 8 Md. 517; 59 A. 1025, 99 Me. 495.

In all cases where conditions in apparent restraint of marriage come into view, it may be an important consideration whether or not the testator has declared a gift over on breach of the condition. In a mere provision for support during celibacy, no gift over is needful; for the bequest is essentially of a temporary and limited kind. *Heath v. Lewis*, 3 D. M. & G. 954; *Mann v. Jackson*, 84 Me. 400, 30 Am. St. Rep. 358, 16 L. R. A. 707, 24 A. 886. And a gift in general restraint of marriage is void whether a gift over accompanies it or not. *Bellairs v. Bellairs*, L. R. 18 Eq. 510; *Smythe*

604. A condition requiring or forbidding constant residence in some particular place or at some particular house is either to be reasonably interpreted, if possible, or else pronounced void as unreasonable of itself and obnoxious to public policy; and this latter view is always tenable where the restraint must so operate as to involve the donee in some breach of permanent and paramount duty.<sup>1</sup>

604a. In various instances conditions clear of meaning are upheld as reasonably violating no rule of policy.<sup>2</sup>

605. Modern wills seek, in some instances, to prevent litigation, by forbidding the beneficiaries named to dispute the will. No arbi-

*v. Smythe*, 90 Va. 638, 19 S. E. 175; (1895) 1 Ch. 449. But if the gift be properly a conditional one, courts frequently pronounce the restraint, though a permitted one, mere *in terrorem* words, unless a gift over for breach is added, to make forfeiture complete and show that the testator was really in earnest. 2 Jarm. Wills, 45, 46; 3 Mer. 108; 2 L. R. Ir. 442; *Cornell v. Lovett*, 35 Penn. St. 100; *Maddox v. Maddox*, 11 Gratt. 804; *Harmon v. Brown*, 53 Ind. 207; *Dawson v. Oliver-Massey*, 2 Ch. D. 753; *Otis v. Prince*, 10 Gray, 581. See 21 Fla. 629; 170 Mass. 506, 49 N. E. 916.

<sup>1</sup> As in compelling married persons to live apart. *Wilkinson v. Wilkinson*, L. R. 12 Eq. 604; 54 Hun, 552; *Conrad v. Long*, 33 Mich. 79. But see as to limitation on a gift, 3 Demarest, 108; *Moore, Re*, 39 Ch. D. 116; *Hawke v. Euyart*, 30 Neb. 149, 27 Am. St. Rep. 391, 46 N. W. 422; L. R. 13 Eq. 606; *Thayer v. Spear*, 58 Vt. 327, 2 A. 161. See also, where the gift was upon condition (no direct inducement to separation), *Born v. Horstmann*, 80 Cal. 452, 5 L. R. A. 577; 22 P. 169, 338. See also *Robertson v. Mowell*, 66 Md. 530, 565, 8 A. 273; *Clough v. Clough*, 52 A. 449, 71 N. H. 412. Ordinarily one who is to be supported under a provision in a will is not limited to live in a particular place, especially if there be good reason for leaving it. *Proctor v. Proctor*, 141 Mass. 165, 6 N. E. 849. But see as to infant living during minority with a suitable person named as sole guide and guardian, *Johnson v. Warren*, 74 Mich. 491, 42 N. W. 74; (1894) 1 Ch. 351.

<sup>2</sup> As in a gift on condition that a certain chapel is built in three years. *Tappan's Appeal*, 52 Conn. 412. Or on condition of rearing in a prescribed religious faith. *Magee v. O'Neill*, 19 S. C. 170, 45 Am. Rep. 765. See *Paulson's Will*, 107 N. W. 484, 127 Wis. 612, 115 Am. St. Rep. 1060, 5 L. R. A. (N. S.) 804; 173 Mass. 521, 54 N. E. 255 (condition precedent of raising a certain sum additional). Or on condition of trying to defeat a pending lawsuit against the testator. *Cannon v. Apperson*, 14 Lea, 553. Or on condition that the parties become reconciled. *Page v. Frazer*, 14 Bush, 205. Or provided the minister shall wear a black gown in preaching. *Robinson, Re*, (1897) 1 Ch. 85. Or if one has learned a useful business, etc., and is of good moral character. *Webster v. Morris*, 66 Wis. 366, 28 N. W. 353, 57 Am. Rep. 278; 49 A. 574, 70 N. H. 591. A gift may be made on condition of rendering life support to another. *Irvine v. Irvine*, 28 Ky. L. R. 262, 89 S. W. 1193; *Hoyt v. Hoyt*, 59 A. 845, 77 Vt. 244; 48 S. E. 412, 120 Ga. 810. And see 57 A. 387, 76 Vt. 338 (attending to testator's grave); 71 N. E. 801, 185 Mass. 560, 102 Am. St. Rep. 362. Or on condition of the reformation of a dissipated beneficiary. See *Cassem v. Kennedy*, 147 Ill. 660, 35 N. E. 738; *Burnham v. Burnham*, 79 Wis. 557, 48 N. W. 661; *Hawke v. Euyart*, 30 Neb. 149, 27 Am. St. Rep. 391, 46 N. W. 422. That a condition not uncertain or ambiguous happens to be injudicious is insufficient reason for setting it aside; but all conditions should be justly and reasonably construed. 98 F. 495; 160 Mass. 431, 35 N. E. 1066; 147 Ill. 660, 35 N. E. 738.

Gifts on condition of assuming some specified name are upheld. 1 Ch. D. 441; 90 N. W. 560, 64 Neb. 563. And so are gifts to servants on condition of good conduct and remaining in service. See *Reuff v. Coleman*, 30 W. Va. 171, 3 S. E. 597.

trary rule meets well the cases likely to arise under this head, but circumstances ought to influence the construction.<sup>1</sup>

605a. A bond to abide by the provisions of a will and not to contest it is valid; and so are agreements generally among those interested in the estate, for the avoidance or adjustment and compromise of family controversies.<sup>2</sup>

606. Conditions against bankruptcy or insolvency, or spendthrift trusts, as they are sometimes termed, remain for final notice. A will which purports to vest in a devisee or legatee either real or personal property or the income of real or personal property, and secure to him its enjoyment free from liability for his debts, is void on grounds of public policy, not to add repugnancy, as being in fraud of the rights of creditors; or, in other words, because it takes away another of the incidents of property dominion as essential as the right to dispose of it.<sup>3</sup> But the distinction noted in restraints upon marriage<sup>4</sup> avails once more to distinguish in sense a gift upon condition from a mere limitation.<sup>5</sup>

<sup>1</sup> The English rule applied to legacies seems the true one; viz., to treat a condition not to dispute the will as *in terrorem*, and void as against sound policy, wherever it appears that the legatee had probable cause for contesting the validity or effect of the will, though not otherwise. 2 Vern. 90; 3 P. W. 344; *Morris v. Burroughs*, 1 Atk. 404. And if the maxim is a just one, it ought to avail as well in a devise; and generally, unless, perhaps, to be interpreted as a strict condition precedent. See *supra*, 603; *Cooke v. Turner*, 15 M. & W. 727; 14 Sim. 493; *Hoit v. Hoit*, 42 N. J. Eq. 388, 7 A. 856. In this country a few decisions bearing upon the point may be found. All clauses or provisions of this character should be construed as strictly as possible, being penal in their operation. *Chew's Appeal*, 45 Penn. St. 228. In some States the *bona fide* inquiry whether a will was procured through fraud or undue influence is not to be stifled by any prohibition contained in the instrument itself. 5 T. B. Mon. 246; 61 How. Pr. 399; 79 Mo. 146. But in other States such conditions are pronounced valid, both as to real and personal property. *Thompson v. Grant*, 14 Lea, 310; *Donegan v. Wade*, 70 Ala. 501; *Beall v. Schley*, 2 Gill. 181, 41 Am. Dec. 415; *Bradford v. Bradford*, 19 Ohio St. 546, 2 Am. Rep. 419; 84 N. Y. S. 937.

These conditions are pronounced valid and legal: Not to interfere with the trustees (as to an annuitant). 45 Ch. D. 426. Not to bring in a bill against the estate. *Farnham v. Baker*, 148 Mass. 204, 19 N. E. 371. To bear all expenses if litigating. 42 N. J. Eq. 388, 7 A. 856. Not to elect statute provision as widow. *Carr's Estate*, 138 Penn. St. 352, 22 A. 18. So far as needless testamentary construction is concerned, or an attempt to impeach the title to what is given under the will and invite contests on technical points, or any unfair probate contest without just cause, the operation of a condition not to litigate may be fairly favored. See *Smithsonian Institution v. Meech*, 169 U. S. 399, 42 L. Ed. 793 (1897); *Friend's Estate*, 58 A. 853, 209 Penn. 442, 68 L. R. A. 447 (probable cause).

<sup>2</sup> *Barrett v. Carden*, 65 Vt. 431, 36 Am. St. Rep. 876, 26 A. 530; *Carmichael v. Carmichael*, 72 Mich. 76, 16 Am. St. Rep. 528, 1 L. R. A. 596, 40 N. W. 173; 86 Ga. 636, 22 Am. St. Rep. 487, 12 S. E. 1065. *Aliter*, as to sinister agreements for unfair purpose. 65 Vt. 434, 36 Am. St. Rep. 876, 26 A. 530. Statutes sometimes favor or sanction compromise, etc. agreements.

<sup>3</sup> 2 Jarm. Wills, 22; 601 *supra*; *Nichols v. Eaton*, 91 U. S. 716, 23 L. Ed. 254; *Brandon v. Robinson*, 18 Ves. 429, 433.

<sup>4</sup> *Supra*, 603.

<sup>5</sup> Thus, a gift of the income of property, real or personal, to cease on the bankruptcy or insolvency of the devisee, is held good; for no absolute transfer is here intended,

607. **Between gifts upon condition and gifts upon some limitation, conditional or otherwise, we are consequently to distinguish.**<sup>1</sup>

608. **Into the general law of trusts and trustees we need not enter.**<sup>2</sup> But of testamentary trusts we may observe that probate legislation and practice, especially in the United States, tends at the present day to assimilate such trustees, as to their credentials, the method of their appointment and removal, and the supervision of their functions, to the executor. Wherever, in fact, the testator intends that some trust shall be carried out with reference to the residue of his estate or some portion thereof; wherever there is something more to be done than simply to pay off all debts, demands, and legacies, wind up the affairs and the property, and distribute the balance among the objects designated by the will or statute, permitting both realty and personalty to go absolutely and forever to certain parties; it is proper that the will should declare a trust and designate the trustee or trustees.<sup>3</sup>

but only a provision during solvency, an encouragement to the punctual discharge of one's debts. *Brandon v. Robinson*, 18 Ves. 433; 1 Bro. C. C. 274; *Lewin Trusts*, 80; *Tillinghast v. Bradford*, 5 R. I. 205; *Nichols v. Eaton*, 91 U. S. 716, 23 L. Ed. 254; *W. N.* 109; *Metcalfe v. Metcalfe*, 3 Ch. (1891) 1. But upon a further extension of this principle, the cases are somewhat discordant. *Lewin Trusts*, 80; *Nichols v. Eaton*, *supra*; *Samuel v. Samuel*, 12 Ch. D. 125. Instead, however, of making the trust simply cease and determine upon his bankruptcy or insolvency, the will may provide that in such event that part of the income shall go to some other person or persons specified, and even to wife and children, since their interests are distinct from his own. Leading American cases, and perhaps the weight of English authority, favor this further proposition: that if the gift over is declared for the support of the bankrupt and his family in such manner as the trustees may think proper, there is nothing left to which creditors or the assignee in bankruptcy can assert a valid claim. *Nichols v. Eaton*, 91 U. S. 716, 23 L. Ed. 254, and cases cited; *Easterley v. Keney*, 36 Conn. 18; 10 Sim. 487, 642. And see *Shankland's Appeal*, 47 Penn. St. 113; *Nickell v. Handy*, 10 Gratt. 336; *Campbell v. Foster*, 35 N. Y. 361; *Pope v. Elliott*, 8 B. Mon. 56.

For forfeiture of the beneficial enjoyment of the bequest, see (1895) 2 Ch. 235, cases *supra*; 5 R. I. 205; 4 Rich. Eq. 131.

As to "spendthrift trusts" and protecting against creditors generally, see 5 R. I. 205; 4 Rich. Eq. 131; *Mason v. R. I. Trust Co.*, 61 A. 57, 78 Conn. 81; 62 A. 948, 78 Conn. 498; *Goulder, Re*, (1905) 2 Ch. 100; 55 A. 1067, 206 Penn. 405; 82 N. E. 813, 230 Ill. 610. See also *Rife v. Geyer*, 59 Penn. St. 393, 98 Am. Dec. 351; *White v. White*, 30 Vt. 338; 8 B. Mon. 56; *Broadway National, Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 504; 151 Mass. 266, 21 Am. St. Rep. 448, 7 L. R. A. 393, 23 N. E. 843; 91 U. S. 716, 23 L. Ed. 254, and cases cited; 146 Mass. 369, 15 N. E. 783; *Carew, Re*, (1896) 1 Ch. 527.

<sup>1</sup> Thus, a simple gift of property by will on condition that A shall not remarry is a gift upon condition; a gift on condition that A shall not remarry, otherwise over to C, is a gift upon conditional limitation; while a gift which carries the beneficial enjoyment of income to A until his or her remarriage and no longer is a gift upon limitation and cannot endure after A marries again. *Supra*, 603; *Whiting v. Whiting*, 42 Minn. 548.

<sup>2</sup> See *Hill Trustees*, 61; *Perry Trusts*, §§ 90-93; *Lewin Trusts*, 66.

Technical words such as "trust" or "trustee" are not indispensable in a will. *Hughes v. Fitzgerald*, 60 A. 694, 78 Conn. 4; 87 S. W. 590, 113 Mo. App. 444. Cf. *Walker v. Hill*, 60 A. 1017, 73 N. H. 254.

<sup>3</sup> Not that the trust necessarily fails because no trustee is named, any more than a will which names no executor; one may appoint the same persons to be both executors

609. **Respecting the nature and quality of the estate taken by trustees under a will**, the modern rule, which is aided in England by the Statute of Victoria and in this country by local legislation, inclines to vest in them a legal estate sufficient for the execution of the trust as an incident to the trust in all cases; at the same time limiting that legal estate to what may be requisite for a complete execution of the trust.<sup>1</sup>

610. **Trust provisions in a will, in order to stand, must be not only consonant with public policy, but of so clear and definite a nature that the court may, in the exercise of its ordinary judicial functions, render them effective.**<sup>2</sup> Various trusts which a testator

and trustees under his will, or he may appoint different ones; but if the will imports a trust, some trustee or trustees should hold the fund and carry out the particular purpose. The advantage of this is obvious; the testator's intentions, if the court approve the selection, will be carried out by those of his own choice; and, to speak more generally, not only does a legal title support various expectant and contingent or uncertain interests held in suspense, and conditions or restraints upon the dominion of property, which otherwise might fail, but the whole purpose of one's will is executed by some third party who holds the scales between present and future beneficiaries and all contending parties in interest. In the simple devise of a dwelling-house to one's widow for life and over in fee to the children, wills frequently declare no trust. But where the gift is more complex as to subject or objects, trustees to hold the fund are desirable. Executors are sometimes authorized to fulfil some trust under the will and the estate vests in them accordingly for the declared purpose. See 29 N. Y. 39; *Tompkins, Re*, 154 N. Y. 634, 49 N. E. 135; *Colton v. Colton*, 127 U. S. 300, 32 L. Ed. 138; *Ingraham v. Ingraham*, 169 Ill. 432, 48 N. E. 561, 49 N. E. 320; 75 N. E. 149, 189 Mass. 176.

<sup>1</sup> See this subject discussed at due length by general writers on the law of trusts, Perry and Lewin more particularly. See also *Young v. Bradley*, 101 U. S. 782, 25 L. Ed. 1044; Stat. 1 Vict. c. 26, §§ 30, 31; 1 B. & C. 336; *Blagrove v. Blagrove*, 4 Ex. 550; 11 Ad. & El. 188; *Barker v. Greenwood*, 4 M. & W. 421; 2 Jarm. Wills, 289-323.

Legislation in our several States tends to simplify the administration of testamentary trusts by bringing such trustees under the immediate supervision of the probate court, instead of leaving all to the more indefinite direction of chancery. The same tribunal which authenticates the will and issues letters testamentary to the executor appoints or confirms the appointment of the will by granting letters of trusteeship under its seal in like manner. By the time the decedent's estate is sufficiently advanced in settlement, the trustee named in the will presents a suitable petition, upon the hearing of which the court grants the letters at discretion; and so, too, wherever a vacancy exists by reason of declination or otherwise. Before his credentials issue he must file a bond with sufficient surety approved by the court, unless the will has requested otherwise; and his letters may be revoked on good cause and some one else appointed, the court regarding the security and interests of the beneficiaries in all cases. The executor transfers the trust fund to the trustee thus officially vested with authority to receive it, crediting himself in his accounts accordingly and closing the accounts when his functions are fully performed; and the trustee, returning his own inventory and regular accounts from time to time, carries on the bookkeeping of the estate, or rather of the fund under his own direction, as matter of public record, and under the supervision of the court of probate and of the appellate tribunal which exercises probate and equity jurisdiction, until the trust is completely discharged.

<sup>2</sup> See *McHugh v. McCole*, 97 Wis. 166, 65 Am. St. Rep. 106, 72 N. W. 631. A trustee may be empowered by will to designate his own successor. *Orr v. Yates*, 70 N. E. 731, 209 Ill. 222. Cf. *Boning's Estate*, 63 A. 296, 214 Penn. 19.



may have attempted to create are pronounced invalid or liable to be set aside.<sup>1</sup> Moreover, a court of equity will order trust property under a will to be conveyed by the trustee to the beneficiary, where there was what is called a dry trust, or where the purposes of the trust have been accomplished, or where no good reason appears why the trust should continue and all the persons interested in it are *sui juris* and desire the trust terminated.<sup>2</sup>

611. **All executors, trustees and other fiduciaries are held to a certain degree of care and prudence in the exercise of their duties, and moreover, must act honestly and in good faith.**<sup>3</sup>

<sup>1</sup> *Rose v. Hatch*, 125 N. Y. 427, 26 N. E. 467; 115 N. Y. 346, 357, 22 N. E. 150. Cf. § 608. Thus the same person cannot be made at the same time trustee and beneficiary of the same identical interest. *Fairchild v. Edson*, 154 N. Y. 190, 61 Am. St. Rep. 609, 48 N. E. 541.

Wherever the will gives a legacy in some secret trust which is contrary to public policy, equity treats the gift as void and enforces a trust as for the benefit of next of kin or residuary beneficiaries, not permitting the legatees named to enjoy it absolutely. And where the will creates a trust without a beneficiary the trustee holds for the benefit of heirs or distributees of the testator. *Sims v. Sims*, 94 Va. 580, 64 Am. St. Rep. 772, 27 S. E. 436.

<sup>2</sup> Thus, should the testator have directed a trust for paying income to his beneficiary, with no gift over of the capital, the latter, if of age and *sui juris*, may have that trust set aside in equity as a dry one and enjoy the property absolutely, unless the court is convinced that good reason exists to the contrary. 149 Mass. 22, 14 Am. St. Rep. 393, 3 L. R. A. 370, 20 N. E. 454; *Perry Trusts*, § 920; *supra*, 507. See *Carter v. Long*, 81 S. W. 162, 181 Mo. 701.

<sup>3</sup> Even where a trustee, under the terms of a will, may invest in such securities "as he shall see fit," this means "as he shall honestly see fit." *Smith v. Thompson*, (1896) 1 Ch. 71. And the bailment degree of prudence is usually to be presumed, in addition.

## APPENDIX.

## A. FORMS OF WILLS.

No. 1. *A solemn form of will, once common, where a married man of property provided for his family.*

In the name of God, Amen. I, A B, of, etc., being in good bodily health,<sup>1</sup> and of sound and disposing mind and memory, calling to mind the frailty and uncertainty of human life, and being desirous of settling my worldly affairs, and directing how the estates with which it has pleased God to bless me shall be disposed of after my decease, while I have strength and capacity so to do, do make and publish this my last will and testament, hereby revoking and making null and void all other last wills and testaments by me heretofore made. And, first, I commend my immortal being to Him who gave it, and my body to the earth, to be buried with little expense or ostentation, by my executors hereinafter named.

And as to my worldly estate, and all the property, real, personal, or mixed, of which I shall die seized and possessed, or to which I shall be entitled at the time of my decease, I devise, bequeath, and dispose thereof in the manner following, to wit:—

*Imprimis.* My will is, that all my just debts and funeral charges shall, by my executors hereinafter named, be paid out of my estate, as soon after my decease as shall by them be found convenient.<sup>2</sup>

*Item.* I give, devise, and bequeath to my beloved wife, C B, all my household furniture, and my library in my mansion or dwelling-house, my pair of horses, coach, and chaise, and their harnesses; and also fifteen thousand dollars in money, to be paid to her by my executors hereinafter named, within six months after my decease; to have and to hold the same to her, and her executors, administrators, and assigns forever. I also give to her the use, improvement, and income of my dwelling-house and its appurtenances, situated in —, my warehouse, situated in —, and my wharf situated in —, and called — Wharf; to have and to hold the same to her for and during her natural life.

*Item.* I give and bequeath to my honored mother, O B, two thousand dollars in money, to be paid to her by my executors hereinafter named, within six months after my decease; to be for the sole use of herself, her heirs, executors, administrators, and assigns.

*Item.* I give and bequeath to my daughter, D B, my fifty shares of the stock of the president, directors, and company of the — Bank, which are of the par value of five thousand dollars, my fifty shares in the stock of the — Insurance Company, which are of the par value of five thousand dollars, and my ten shares of the stock of the — Manufacturing Company, which are of the par value of ten thousand dollars; to have and to hold the same, together with all the profit and income thereof, to her

<sup>1</sup> If the testator is in failing health, he should prefer to say something like this: "being in sufficiently good health and of sound and disposing mind;" etc.; or, "being in declining health, but of sound and disposing mind, etc."

<sup>2</sup> This direction is, of course, merely formal, but many testators still prefer its insertion as an aid to actual intent, or with some special application indicated.

the said D B, her heirs, executors, administrators, and assigns, to her and their use and benefit forever.

*Item.* I give, devise, and bequeath to my son, E B, the reversion or remainder of my dwelling or mansion house, situated in —, and its appurtenances, and all profit, income, and advantage that may result therefrom, from and after the decease of my beloved wife, C B; to have and to hold the same to him, the said E B, his heirs and assigns, from and after the decease of my said wife, to his and their use and behoof forever.

*Item.* I give, devise, and bequeath to my son, F B, the reversion or remainder of my warehouse, situated in —, and its appurtenances, and all the profit, income, and advantage that may result therefrom, from and after the decease of my beloved wife C, B; to have and to hold the same to the said F B, his heirs and assigns, from and after the decease of my said wife, to his and their use and behoof forever.

*Item.* I give, devise, and bequeath to my son, G B, the reversion or remainder of my wharf, situated in —, called — Wharf, and its appurtenances, and all the profit, income, and advantage that may result therefrom, from and after the decease of my beloved wife, C B; to have and to hold the same to the said G B, his heirs and assigns, from and after the decease of my said wife, to his and their use and behoof forever.

*Item.* All the rest and residue of my estate, real, personal, or mixed, of which I shall die seized and possessed, or to which I shall be entitled at the time of my decease. I give, devise, and bequeath, to be equally divided to and among my said sons, E B, F B, and G B.

*Lastly.* I do nominate and appoint my said sons, E B, F B, and G B, to be the executors of this my last will and testament [and request that each and all of them may be exempt from giving any surety or sureties upon their official bond<sup>1</sup>].

In testimony whereof, I, the said A B, have to this my last will and testament, contained on three sheets of paper, and to every sheet thereof, subscribed my name, and to this the last sheet thereof I have here subscribed my name and affixed my seal, this first day of May, in the year of our Lord one thousand nine hundred and nine.

A B. [L.S.]

Signed, sealed, published, and declared by the said A B as and for his last will and testament, in presence of us, who, at his request, and in his presence, and in the presence of each other, have subscribed our names as witnesses hereto.<sup>2</sup>

U V.

W X.

Y Z.<sup>3</sup>

<sup>1</sup> It is matter of prudent discretion in the testator to omit or insert this clause.

<sup>2</sup> The attestation clause may vary somewhat, as well as the number of witnesses, according to circumstances and the local requirements of legislation. See *supra*, 300-356. In some States the residence of witnesses should be given, and this is always a safe precaution.

<sup>3</sup> It should be borne in mind that by the modern rule of England and many States two witnesses are enough. But where the will is to operate in various States where land lies, it may often be safer to employ three witnesses; a course, never obnoxious to local law, whereby any will is more strongly fortified for its probate.

No. 2. *Will in simplest form, giving to one absolutely all the testator's real and personal estate.*

This is the last will and testament of me [testator's name and residence]. I give, devise, and bequeath all the real and personal estate of every description, to which I shall be entitled at the time of my decease, unto [devisee's name and residence], absolutely; [but as to estates vested in me upon trust or by way of mortgage, subject to the trusts and equities affecting the same respectively<sup>1</sup>]. And I appoint the said [name] sole executor of this my last will, hereby revoking all other testamentary writings. Witness my hand and seal this 15th day of January, A. D. 1910.

Witnesses—

A B. [L.S.]<sup>2</sup>

U V.

W X.

No. 3. *Will intended for the appointment of executors merely, the property to go as in case of the maker's intestacy.*

I, A B, of, etc., do hereby make this my last will and testament.

I appoint my son, C D, and my son-in-law, E F, to be executors of this will, and direct that they shall not be required to give sureties upon their bond as such.

I dispose of my property and estate in the same manner as the same would descend and be distributed by law, if this will had not been made, my purpose being only to appoint executors and exempt them from being required to give sureties upon their bond, but not in any way to change the disposition which the law would otherwise make of my estate.

In testimony whereof, I, the said A B, hereto set my hand and seal, and publish and declare this to be my last will and testament in presence of the witnesses named below, on this twentieth day of January, in the year of our Lord one thousand eight hundred and ninety.

A B. [Seal.]

Signed, sealed, published, and declared by the above-named A B as and for his last will and testament in presence of us, who, in his presence, and in the presence of each other, and at his request, have hereto subscribed our names as witnesses.

U V.

W X.

Y Z.

No. 4. *A simple form of will, which makes the widow one's residuary legatee.*

Know all men by these presents, that I, A B, of, etc., do make and declare this to be my last will and testament, hereby revoking any and all wills by me at any time heretofore made.

I give and bequeath to each of my children, C D, E F, G H and I J, the sum of five thousand dollars.

I give and bequeath to my daughter K L the sum of ten dollars.

<sup>1</sup> This clause is not indispensable.

<sup>2</sup> Even the seal may be omitted. *Supra*, 309. And the customary witness clause, though very desirable, is not an essential. *Supra*, 346.

All the residue of my estate real and personal of which I shall die seized and possessed, or to which I shall at my decease in any way be entitled, I give, devise, and bequeath to my beloved wife M N, to have and to hold the same to her, her heirs and assigns forever.

I nominate and appoint my said wife M N to be the sole executrix of my estate, and direct that she be exempted from giving sureties on her official bond.

In witness whereof I hereunto set my hand and seal, and publish and declare this to be my last will, this fourth day of April, in the year of our Lord one thousand nine hundred and five.

A B. [Seal.]

Signed, sealed, published, and declared by the said A B as and for his last will and testament, in the presence of us who, in his presence, and at his request, and in the presence of each other, have subscribed our names as witnesses.

U V.

W X.

Y Z.

No. 5. *A will which places the residue in trust for the benefit of an unmarried niece during life, and to go at her death to her child, etc., if she has any, otherwise to other relatives of the testator.*

Be it known that I, A B, of, etc., gentleman, feeling how uncertain life is, and wishing to dispose of my property in a manner different from that which applies to the estate of persons intestate, do now make, publish, and declare this to be my last will and testament, viz.:—

*First:* I wish all my just debts and funeral expenses to be promptly paid.

*Secondly:* I give and bequeath unto my brother-in-law, C D, of Cincinnati, two thousand dollars.

*Thirdly:* I give and bequeath unto my faithful servant, E F, five hundred dollars as a token of my esteem for him.

*Fourthly:* I give and bequeath unto the Children's Hospital of New York city, a corporation duly incorporated under the laws of the State of New York, the sum of five thousand dollars.

*Fifthly:* I give and bequeath unto G H, of Baltimore, Maryland, in case she be living at the time of my decease, one hundred dollars, as an acknowledgment of her kind care of my sister during her last sickness.

*Sixthly:* I give and bequeath unto my cousin, I J, of, etc., my gold watch, chain, and appurtenances, with my best wishes for the future.

*Seventhly:* All the residue and remainder of my estate, wheresoever and whatsoever it may be, at the time of my decease (including any lapsed legacies) and all rights, claims, and properties, real, personal, or mixed, and whether now held or hereafter obtained by me, I do give, devise, and bequeath unto the said C D, his heirs, executors, administrators, successors, and assigns, to have and to hold the same forever. But nevertheless *in trust*, and upon the uses and trusts and for the purposes following, namely: To be held, managed, and invested, and from time to time, as need be, reinvested by the said C D, trustee, or his successor in said trust, for the benefit and advantage of my only niece, K L, daughter of the said C D, and in such

good and productive stocks or mortgages as will produce, if possible, a sure and regular income, the whole net interest or income of which fund is to be paid over to the said K L during her natural life (and as often as once every six months, if desired) upon her own order or receipt, and without being subject in any degree to the order, intervention, or control of any husband she may have, or of any creditor of her or her husband aforesaid; my object being to secure to her during her natural life, the use and enjoyment of all the income of said property (which is to be invested productively) beyond the control of her said husband or of any such creditor; and upon the decease of the said K L, the said principal trust fund and all earnings or accumulations thereon then remaining unclaimed by her in the hands of said trustee or of his successor in said trust, after deducting the expenses incident to the trust, is to be paid over and distributed to the issue of her body then living, if any (the issue, if any, of her children to take the same share that their deceased parent would have taken if so living by right of representation), for their use and benefit forever, share and share alike. But in case the said K L shall die without lawful issue or direct heirs as aforesaid claiming through the said K L, then and in such case the whole of said principal trust fund and the net earnings remaining shall be paid over and belong to the said C D, if then living, or in case of his death, to his lawful heirs, for his or their own proper use and benefit forever.

*Eighthly:* I do hereby fully authorize and empower the trustee above named, or any successor in said trust, to sell and dispose of any property real or personal that I may have at the time of my decease, and to make good and valid instruments of transfer thereof or any part thereof or any rights therein for the purposes aforesaid (and no purchaser shall be bound to see to the application of the purchase-money or consideration paid therefor) and also to change the investments from time to time and as often as the said trustee for the time being may think proper for the end and purposes above mentioned. And in case of the death, refusal, or inability of the said C D to act as said trustee, the Judge of Probate for the county or place where this will may be proved may appoint some other person to act as trustee as aforesaid, and such new trustee, so to be appointed, is to have all and the same powers and to perform the same duties as the trustee above mentioned. My desire being to have the property prudently and securely managed rather than hazarded in what may promise great gains. And I hereby revoke all other wills heretofore made by me. And

*Lastly:* I appoint the said C D executor of this will.

In testimony whereof, I, the said A B, have hereunto set my hand and seal this ninth day of February, nineteen hundred and eight.

A B. [L.S.]

The foregoing was signed, sealed, published, and declared by said A B to be his last will and testament in our presence, who at his request and in his presence and in the presence of each other, have hereunto set our hands as witnesses thereof, the day and year last above written.

U V.  
W X.  
Y Z.

No. 6. *Will and codicil of a single woman, who gives the bulk of her estate to personal friends and in charity.*

I, A B, of, etc., single woman, make this my last will and testament, and revoke all former wills.

*First:* I appoint C D of, etc., executor of this will, and exempt him from giving any bond with surety. I empower my executor and my administrator with the will annexed to sell and convey any land, without the aid of any court, by public or private sale, at discretion, and to execute such deeds as may be convenient and suitable.<sup>1</sup>

*Second:* I give to each of the persons hereinafter named ten thousand dollars, to wit: E F, G H, I J, K L, M N, and O P, six legacies making sixty thousand dollars.

*Third:* I give to each of the persons hereinafter named five thousand dollars, to wit: Q R and S T, two legacies making ten thousand dollars.

*Fourth:* I give to the Boston Athenæum five thousand dollars.

*Fifth:* I give all my household furniture, wearing apparel, jewelry, books, pictures and other effects at my lodgings to E F.

*Sixth:* My private letters and papers, which are chiefly at my lodgings,—meaning hereby all papers not relating to business,—I direct my executor to burn.

*Seventh:* All the residue and remainder of my property and estate, whatsoever and wheresoever, I give and devise to the two following corporations, in equal shares: namely, the Young Women's Christian Association of Boston and the Boston Provident Association.

Witness my hand and seal to this my will, the second day of September, in the year one thousand eight hundred and eighty-three.

A B. [Seal.]

Signed, sealed, published, and declared by the above-named A B as and for her last will and testament, in presence of us, who, in her presence, and at her request, and in presence of each other, have hereto set our hands as witnesses.

U V.  
W X.  
Y Z.

No. 7. *Codicil annexed to the foregoing will.*

I, A B, make this codicil to my last will and testament which was dated Sept. 2, 1883.

*First:* I give to M N, in addition to her former legacy, five thousand dollars.

*Second:* I cancel and revoke the legacy of five thousand dollars given to S T.

*Third:* I give to G H the portrait of my grandmother, painted by Hunt, which is at my lodgings.

*Fourth:* To the Trustees of the Museum of Fine Arts, etc., I give the portrait of my father by Morse.

*Fifth:* In all other respects I confirm my will. Witness my hand and seal this twenty-second day of August, in the year one thousand eight hundred and eighty-six.

A B. [Seal.]

Signed, sealed, published, and declared by the above-named A B as and for a codicil to her last will and testament, in presence of us, who, in her presence, and at her request, and in presence of each other, have hereto set our hands as witnesses.

U V.  
W X.  
Y Z.

<sup>1</sup> A power to executors (or to their survivors or survivor) to sell real estate is often highly desirable in these days for the convenient settlement of an estate.

## B. SUGGESTIONS TO PERSONS MAKING THEIR WILLS.

1. Consider at the outset, whether you are disqualified by the law, wholly or partially, from making a will; or to speak, more particularly, whether you are a minor a married woman, or an alien.<sup>1</sup>

2. Consider whether, by reason of old age or other infirmity, there is any ground for the imputation that your mind is unsound; and if so, make no will unless you have good reason; and when making one, fortify carefully against litigation, both in your scheme of disposition and the proof you leave behind of your mental capacity at the time of the act and that the will was properly executed.<sup>2</sup>

3. Similar considerations apply where you are of intemperate habits, or lately delirious in a fever, or reputed to be queer or crazy on some subject.<sup>3</sup>

4. Consider whether your situation exposes you to the suspicion of being defrauded, coerced, or subject to the undue influence of certain persons; as if, for instance, you should be blind, illiterate, or confined to a sick room and excluded from social intercourse. Here, again, be very careful of the proof that you executed intelligently and of your own free will, and be sure that the instrument is altogether genuine. If your disposition is to benefit some one whose access and opportunity of influencing you is much greater than others having equal natural claims upon your bounty, hedge in the testamentary act all the more carefully with strong and ample proof.<sup>4</sup>

5. A will entirely in your own handwriting affords the best proof that it is genuine. But take heed, when writing out your own will, that its legal expression is sufficiently clear and exact, else a contest may arise over its meaning. One cannot afford to be too secretive.

6. Laymen often err in supposing they can draw wills with more breadth of apprehension and accuracy than a lawyer, and in expressing themselves as though persons in their own trade were to profit by or interpret them. The technical words of the law are better understood and more copiously defined by the courts than those of any mere business pursuit; and both for clearly comprehending the legal effect of your scheme of disposition and for clearly expressing what you comprehend, you should take professional advice. If you purpose an unnatural or complicated disposition of property, involving a considerable estate, it would be very unwise to make the will without consulting some competent third person and submitting to him your plans or your draft.<sup>5</sup> Lawyers themselves have often plunged their own estates into doubtful disputes, by over-confidence in drawing their own wills, without asking for advice and criticism.

7. In these days the safest will is that which deals justly by the natural objects of one's bounty and distributes in a simple manner; attempting little beyond limiting property so as to give the income to some person for life, with capital over on his

<sup>1</sup> *Supra*, 31-64.

<sup>2</sup> *Supra*, 165-213.

<sup>3</sup> *Supra*, 121-128, 143-168.

<sup>4</sup> *Supra*, 214-251.

<sup>5</sup> Wills drawn up without legal advice, and directing that no lawyer should be employed in settling the estate, but that every dispute should be settled by "three judicious, honest men," are likely to invite the litigation they seek to avoid. Mr. Justice Story in *Brownell v. De Wolf*, 3 Mason, 486.



death,<sup>1</sup> if limiting at all. If your estate be a small one and the beneficiaries needy, all the more should you make a simple will and not attempt complex dispositions.

8. Avoid, if possible, precatory words, and uncertainty in gifts, and be careful as to creating conditions, limitations, remainders, etc. Skilful expression and technical knowledge may here prove indispensable.<sup>2</sup> Joint and mutual wills, contingent wills, and all such peculiar kinds give rise to grave disputes.<sup>3</sup>

9. Take care not to transgress local rules against perpetuities and in restraint of accumulation, nor in other respects to make provisions subversive of good morals and sound policy.<sup>4</sup>

10. Remember that in various aspects, bearing upon the construction of wills and the right of persons to take under such dispositions, each State has its own legislation.

11. In the description of the property devised or bequeathed, and of the object of the gift (not to add the interest given), be careful and accurate.<sup>5</sup>

12. Be explicit and clear of mind as concerns the time when interests immediate or expectant shall vest. It is best to keep in view that your will naturally intends to take effect at your death upon your property as it then exists and the objects of bounty, or their relatives, who may then be living. Prefer that interests shall vest at that period or not much later, and that the expression of your will correspond.<sup>6</sup>

13. The rule of taking *per capita* or *per stirpes* is also important. Whether in case your devisee or legatee dies before you, or before his interest vests, you wish his children or other representatives to take his share, is to be considered.<sup>7</sup> The whole question of lapsing by death is an important one in such gifts.

14. In the last two respects and in general, a testator who limits property should consider to what period ownership shall be referred, and how far and in what sense persons are to participate as survivors. If a gift is made to "children," or to others of a class, it is important to know whether the death of one shall carry his share to the others of that class.<sup>8</sup>

15. There are some technical words, such as "heirs," "heirs of body," "issue," which should be employed with discrimination, and the more so where real estate is disposed of.<sup>9</sup>

16. It is useful, and in some cases indispensable, to have trustees to preserve a fund whose capital is not to be at once distributed, but preceded by temporary and successive interests in the property. You had better designate your trust and trustee plainly, just as you would an executor, unless, perhaps, being married, you intend to dispose in favor of your surviving spouse and children, and so give the income for life to such spouse, with reversion to the children; or possibly in some other case, where a parent will be practically a trustee as respects his or her own offspring.

17. A will is hardly worth making if you intend to give nothing outside your immediate family, and as among these to fix their proportions strictly by the statutes

<sup>1</sup> See Forms of Wills, Nos. 1, 5.

<sup>2</sup> See *supra*, Part VI, chaps. 2, 4.

<sup>3</sup> *Supra*, Part V; also 285-291.

<sup>4</sup> *Supra*, 21, 22, 601-660.

<sup>5</sup> See Part VI, chap. 2.

<sup>6</sup> *Supra*, 562-566.

<sup>7</sup> *Supra*, 538-543. And see Book 2, 467.

<sup>8</sup> *Supra*, 529-537.

<sup>9</sup> *Supra*, Part VI, chap. 2.

of descent or distribution. But a will may be useful for naming an executor,<sup>1</sup> or you may wish to make only a partial disposition or to execute a power,<sup>2</sup> or to empower your executor to sell your real estate.

18. Observe scrupulously the statute requirements when executing your will, as to signature, the presence of witnesses, the method of their attestation, their number, their competency, and the like. Be sure to have witnesses sufficient for compliance with local law wherever your real estate may be situated. If, from any cause, your free and intelligent consent to the instrument is likely to be challenged after your death, be as punctilious and circumspect as the circumstances permit. Talk with the witnesses and others, and impress upon them your capable condition. Your witnesses should be disinterested, clear-headed persons, whose testimony will carry favorable weight in support of the will. In some cases it will be prudent to have the instrument read aloud in the presence of others before you sign. Never have a legatee for a witness; select no witness who is likely to stultify himself or yield to bribes; and if there is danger of a contest, do not let those whom disappointed relatives will charge with unfairly influencing your disposition be too prominent when the instrument is actually executed.<sup>3</sup>

19. Permit no alteration of any kind, as a rule, in the instrument after it has been once executed; but if a change be needful, re-execute with care, or execute a new instrument. As for altering or revoking your will more generally, consider the modes permitted by law, and pursue those modes strictly.<sup>4</sup>

20. Remember that marriage, or at all events marriage and the birth of a child, revokes a will already made;<sup>5</sup> that modern statutes infer a revocation *pro tanto*, to let in a child born later than the will, for whom no provision is made;<sup>6</sup> that a child to be disinherited should be named; and that a surviving wife (and in some States a surviving husband) may elect against the will of a spouse, to take as the local statute permits.<sup>7</sup>

21. As for making a new will or codicil, you should be guided by circumstances. A last will composed of one instrument with several later amendments is inconvenient for various reasons. If your health and situation render it doubtful whether the latest codicil or codicils can be admitted to probate, keep the earlier instrument intact, if you would rather have that take effect than die intestate. But if intestacy is your preference, or if you are undoubtedly competent and free to make your present will, the better course is to destroy utterly whatever instrument or instruments precede, and make a new will which shall embrace the whole disposition and stand as sufficient by itself. The best and simplest revocation, moreover, is to burn and utterly destroy; for, to keep an old will among your papers, with marks of cancelling not sufficient to obliterate what was written, or alterations in ink or pencil, is to run the risk of having your true intention misunderstood or perverted at the probate.<sup>8</sup>

<sup>1</sup> See *supra*, 297. As to constituting a testamentary guardian, see 294. See also Forms of Wills, No. 3.

<sup>2</sup> *Supra*, 298, 299.

<sup>3</sup> *Supra*, 300-356.

<sup>4</sup> *Supra*, 380-427.

<sup>5</sup> *Supra*, 424-426.

<sup>6</sup> *Supra*, 20, 480, 481.

<sup>7</sup> *Supra*, 19.

<sup>8</sup> See *passim*, 380-427.

22. Keep your will in such custody that it is not likely to be lost, destroyed, or tampered with, but rather to be properly presented at the probate court after your death. In some States provision is made so that one may have his will kept in a sealed envelope at the registry of probate, subject to his own order while he lives, and not to be opened until after his death. The register's receipt is given for such envelope.

# BOOK II.

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## THE LAW OF EXECUTORS AND ADMINISTRATORS.

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### PART I.

#### INTRODUCTORY CHAPTER.

1. When a person dies, leaving a fair amount of personal property, his estate is usually set apart, in our modern English and American practice, to be settled under the immediate supervision of local and usually county tribunals invested with appropriate and peculiar functions, whose fundamental duty it is to exact a settlement according to law; and, moreover, with due respect to the last wishes of the deceased, if such wishes were properly expressed by him during his lifetime while of sound and disposing mind.<sup>1</sup>

1a. The death of the person is fundamental to all jurisdiction in settling his estate, whether as testate or intestate; and whatever may have been the occasion of error, letters granted upon the estate of a living person are null and cannot take effect against

<sup>1</sup> The main objects proposed are these: that the personalty of the deceased be properly collected, preserved, and (together with income and profits) duly accounted for; that his just debts and the charges consequent upon his death and the administration of his estate be paid and adjusted, with such discrimination only as the law recognizes in case the assets should prove insufficient; that the immediate necessities of spouse and young children (if there be such surviving) be provided for as the statute may have directed; that the distribution and division of the residue or surplus of the estate be made among such persons and in such proportions as the will of the deceased, if there be one, otherwise the statute of distribution may have prescribed. Where a will was left, its establishment and authentication is imposed, and here legacies must be met, next to debts. In any case the representative, executor or administrator, qualifies and receives his credentials from the court.

him.<sup>1</sup> So may the question of actual survivorship be important where one is to inherit from another.<sup>2</sup>

2. *Testate and intestate are here the distinctions*, the one class embracing all estates to be settled under a will; the other, all estates for settlement where there was no will.<sup>3</sup> For settling any estate the representative under a will, so peculiarly intimate in his relation with the thoughts and wishes of the deceased, is styled an *executor* in the former instance; an executor being the person who is charged by the testator with the execution or putting in force of his will.<sup>4</sup> The corresponding representative, for other cases, is an *administrator*; this term applying, not only where the deceased person left no valid will at all, but where the estate is testate, and yet, for one reason or another, there is no person found to execute the will whom the testator may be said to have actually designated or selected for the office.<sup>5</sup>

<sup>1</sup> 55, 91, 160; 2 Cal. App. 241, 83 P. 275; *Jochumsen v. Savings Bank*, 3 Allen, 87; *Devlin v. Commonwealth*, 101 Penn. St. 273, 47 Am. Rep. 710; *D'Arusment v. Jones*, 4 Lea, 251, 40 Am. Rep. 12.

The grant of letters is *prima facie* but by no means conclusive evidence that the death actually occurred. 26 Barb. 383; 6 Thomp. & C. 294; *Mutual Benefit Life Ins. Co. v. Tinsdale*, 91 U. S. 238 (suit on insurance policy); 60 N. Y. 121, 19 Am. Rep. 144; 32 Ala. 353, 70 Am. Dec. 540; 4 Md. 175; 11 Rich. 569. And see 55, 91.

<sup>2</sup> *Ib.* Thus where husband and wife share some calamity, such as a shipwreck, and there is no evidence that one survived the other. *Wing v. Angrave*, 8 H. L. C. 183; *Alston's Goods*, (1892) P. 142; (1898) P. 143; (1897) P. 17.

<sup>3</sup> In many respects, such as the collection and preservation of effects, and the payment of debts and charges, there is little or no essential difference found in our modern practice between these two classes. For it is a fundamental maxim of our common law that all just existing debts shall be paid out of one's property before any further disposition thereof can take effect. Coke, 2d Inst. 398; Bouv. Dict. "Administration." But great differences are perceived when it comes to that further disposition of the dead person's property; a testate estate being divided and distributed according to the testamentary directions of the deceased, while that of an intestate goes by the public mandate. The representative follows a private plan and specifications in the one case, but not in the other, so far as he deals with the surplus above debts and charges.

<sup>4</sup> 2 Bl. Com. 503; 3 Atk. Ch. 301.

<sup>5</sup> 2 Bl. Com. 494. And hence arises some confusion in legal terms when we seek to distinguish between the representatives of testate and of intestate estates; though the words *executors* and *administrators* are commonly employed in that connection as though correlative.

The common law distinction is, in fact, here founded in considerations of privilege attached to the personal choice by the deceased of his own representative,—considerations which in the lapse of time have lost much of their early force. See 2 Bl. Com. 495; Part II, *post*, as to appointment. The modern tendency, both in England and the United States, is to assimilate the powers and duties of these two classes of legal representatives so far as may be.

Nevertheless, *executors* and *administrators* are technically distinguished in our law as before. One selected judicially to settle an estate under a will, not being named in that will, is styled an *administrator* (not *executor*), with the will annexed; and there is no *executor*, so to speak, apart from some designation under the will of the person who shall officiate in the trust. Consequently, "execution" being a term quite liable to legal misconception, and in probate law confined at all events to the narrower

3. That there may be a will without naming an executor was once logically denied.<sup>1</sup> Nevertheless, while there can be no executor without some will to name or constitute him, it is certain that by our modern practice a will properly executed may be valid without naming an executor at all, or notwithstanding the executor named dies before probate or from one cause or another becomes disqualified from acting; in any of which contingencies the probate court will constitute an administrator with the will annexed.<sup>2</sup>

4. The modern extension of testamentary facilities to the disposition of a testator's whole estate, whether real, personal, or mixed, tends to subvert distinctions once made. In the United States, wills are usually permitted to operate upon real estate and descendible interests of every description; and local statutes expressly recognize the right of a testator to pass his after-acquired lands and landed estates and interests, giving effect to his manifest intention accordingly. Manifest intention is the rule of guidance correspondingly as to all dispositions of personalty, though presumptions as to that intention may differ.<sup>3</sup> In England, too, "devise," since the year 1837, has lost much of its special significance.<sup>4</sup>

5. To personal property alone the management, settlement, or administration of the estates of deceased persons relates primarily and fundamentally; for with the real estate of the testate or intestate decedent, his executor or administrator has at common law no concern.<sup>5</sup>

connection, the word "administration" is at the present day acquiring a broad significance, as more nearly synonymous with the general management and settlement of a deceased person's estate. See *e. g.* Bouv. Dict. "Administration." For, as a jurisprudence develops, which takes in the whole compass of our highly interesting and important subject, the necessity becomes felt for a single appropriate and universal term, applicable to estates whether testate or intestate, and to the winding-up of a dead owner's affairs under spiritual or probate supervision; and such a term the common law does not supply.

<sup>1</sup> Swinb. pt. 1, § 3, pl. 19; Godolphin, pt. 1, c. 1, § 2; Plowd. 185; Wms. Exrs. 7.

<sup>2</sup> See 2 Chanc. Rep. 112; Appointment, *post*, Part II.

<sup>3</sup> 4 Kent Com. 501.

<sup>4</sup> Stat. 1 Vict. c. 26, extends the power of disposing by one's will of all real and personal property as owned at the time of death, although acquired after execution of the will. See Book I, 28, 29.

<sup>5</sup> This rule is owing partly perhaps to the jealousy with which bishops and their tribunals of special jurisdiction over estates of the dead were formerly regarded; but we should chiefly ascribe it to that stability of real estate tenure as contrasted with title to personal property, which is at the basis of English policy and English jurisprudence. An ancestor's lands vested in his descendant at his decease without further formality; the heir-at-law became invested with the dignities and responsibilities pertaining to the founder; in England a statute of descents was not framed like a statute of distributions. Debt and charges, nevertheless, remain obligatory upon the estate, so long as property of the deceased may be found for their satisfaction;

6. "Succession" is a general term used in civil law with reference to the status derived from the transmission of the rights and obligations of a deceased person; but "title by succession" is very different from that representative or trust title to personalty which one takes at our law as an executor or administrator; being indeed so complex and abstruse a topic as hardly to deserve our studious attention.<sup>1</sup>

7. Testacy has been so much preferred to intestacy in civil and common law that abuses formerly existed where estates were left intestate to be administered.<sup>2</sup>

and hence, if the personal assets prove insufficient, the lands may be applied to make up the deficiency on license of the court; modern statutes in England and the United States greatly enlarging all earlier facilities in this respect. Moreover, an executor may have been empowered in fact to deal with real estate under the will of his testator. See Part VI, *post*.

<sup>1</sup>The heir stepped into the place vacated by the deceased, enjoying his property rights, and burdened with his property responsibilities; this was the fundamental principle of succession, the successor himself being called at Roman law *haeres*, and that to which he succeeded *haereditas*. The old theory of succession was gradually forsaken in the latter days of the Roman empire, the heir becoming more nearly in effect like what we style an executor or administrator, if so he preferred. See Hunter Roman Law, 567-576. It is to be presumed that the person who was instituted heir might renounce the succession if he chose, and thus escape all burdensome obligations. And in default of a *testamentary succession*,—that is, the constitution of the heir by a will duly executed in the forms prescribed by law,—or where he renounced the inheritance, a *legal succession* arose in favor of the nearest relatives of the deceased; moreover, an *irregular succession* became established by law in favor of certain persons or of the State in default of heirs either legal or instituted by testament. Such doctrines certainly pertain to the civil law of modern Europe and of American colonies founded by the French and Spanish. Domat Civ. Law by Strahan, § 3125; Bouv. Dict. "Succession."

"Administration" and "administrators" are terms not employed, however, by either the ancient or modern civilians, as it would appear, though our "administration" somewhat resembles the *bonorum possessio* of imperial Rome. Colquhoun Rom. Civ. Law, § 1413. But, as concerns the settlement of testate estates, while the Roman testator seldom committed such functions to other persons than the testamentary heir himself, and similar restraints are still imposed in some European localities, modern custom in France greatly favors the special institution of executors, and leaves the testator at liberty to name persons who shall take all or part of the movable property for executing the dispositions under the will confided to their care. Domat Civ. Law, §§ 3330-3334. And see *Van Gieson v. Bridgford*, 18 Hun (N. Y.) 73.

<sup>2</sup>The contempt of our early English law for those who from want of foresight or opportunity died leaving behind them personal property not bequeathed by some last will and testament in a formal manner was strikingly manifested. The intestate came into the category of bastards and other unfortunates. The king, according to the old maxims, might seize upon his goods and chattels as *parens patriæ*; and for a considerable time the feudal superior or lord of a demesne exercised by delegation the right of administration; after which this branch of the prerogative passed to the bishop or ordinary in the several dioceses upon a trust to distribute the residue of the intestate's goods in charity to the poor or for what were deemed pious uses. These prelates soon abused a trust for which they were held accountable in truth only to God and their spiritual superiors; they would take to themselves, in their several jurisdictions, the whole surplus of an intestate's estate after deducting the *partes rationabiles*; that is to say, two-thirds to which one's wife and children (if he left such) were entitled; and this without even paying his just debts and lawful charges. 2 Bl. Com. 495, 496; 9 *post*.

8. **Devises were once restricted, in order that lands might descend to the heir under the rule of primogeniture.**<sup>1</sup> But primogeniture was early discarded in this country; and since our independence, American policy has favored, in the several States, the execution of wills with the same formalities, whether to pass real or personal property, or both kinds together. The same just doctrine has at length gained a firm footing in England.<sup>2</sup>

9. **Wills of personal property seem to have been once restricted under the doctrine of reasonable parts, where one died leaving a wife or issue or both surviving him.**<sup>3</sup>

10. **Jurisdiction over wills and their probate in England belonged, before ecclesiastical functions were exercised in such cases, to the county court or to the court baron of the manor where the testator died; and before these county tribunals all other matters of civil dispute were determined.** Soon after the Norman invasion, however, the ecclesiastical and temporal jurisdictions were separated; and gradually the bishops became invested with plenary authority as to matters which pertained to the estates of the dead.<sup>4</sup>

Two acts of Parliament put an end to this abuse of spiritual power: (1) the Statute of Westm. II, declaratory of the common law, which required the ordinary to pay the debts of the intestate so far as his goods extended, in the same manner that executors were bound to do where one died testate; (2) the Statute 31 Edw. III, c. 11, under whose later provisions the ordinary ceased to be a sort of *haeres* under an intestate succession, and became obliged to depute administration to the nearest and most lawful friends of the deceased, instead of administering as before in person and without accountability. 2 Bl. Com. 495, 496; Wms. Exrs. 7th Eng. ed. 401; Snelling's Case, 5 Rep. 82 b. These statutes went far towards altering former hardships and bringing executors and administrators upon an equivalent footing of legal accountability to all those interested in the estate; though abuses continued as to surpluses, for which the temporal administrator in his turn deserved reproach, the ecclesiastical courts having endeavored in vain to force a proper distribution of intestate estates by taking bonds from these legal representatives to that intent. At length was enacted the Statute of Distributions, 22 & 23 Car. II, c. 10, and the administrator of an intestate estate could no longer administer for his personal benefit. Wms. Exrs. 1484. The first American colonies were planted before the date of this last important enactment of the English Parliament; but positive enactments of a similar character have long prevailed in every State of this Union. And how much of excellent legislation on dry subjects our countries of English origin trace to the reign of that good-natured and dissipated monarch who followed Cromwell and the Commonwealth, no jurist can ever forget.

<sup>1</sup> Wms. Exrs. 1; Co. Litt. 111 b, note (1) Harg.

<sup>2</sup> 4 Kent Com. 504, 505; Stat. 1 Vict. c. 26; Wms. Exrs. 5.

<sup>3</sup> In such a case the man's goods and chattels, if he left both wife and children, were divided into three equal parts: one went to his heirs or lineal descendants, another to his wife, and only the remaining third went according to his own express disposition; though, if only a wife survived him, or only issue, a moiety went to such wife or such issue, and he might bequeath the other moiety. These shares of wife or children were called their reasonable parts, and the writ *de rationabili parte bonorum* lay for the recovery of these portions. This restriction, however, whether originating in common law or local custom gradually disappeared, the date of its extinction as well as of its origin being obscure. Wms. Exrs. 2, 3; Co. Litt. 176 b; 2 Bl. Com. 492.

<sup>4</sup> According to Blackstone, the disposition of intestates' effects once granted in confidence by the crown to the ordinary, the probate of wills (as to personalty) fol-



11. **The American system of jurisdiction over estates of the deceased was always far more simple and symmetrical than that which thus grew up in the mother country.** Our early ancestors felt the need of some tribunal whence letters testamentary and of administration should issue; and at the same time, rejecting the idea of a spiritual jurisdiction and courts of bishops such as then made part of the British system, they came back to the primitive notion of county courts which should blend probate with common-law functions. From these county courts lay an appeal to the supreme temporal tribunal. But, as population grew, these powers exercised by the inferior courts called once more for a division, without, however, any necessity for placating bishops. New county tribunals were accordingly erected for the transaction of such business as might pertain to the estates of the dead, testamentary trusts, the guardianship of orphans, and the like. To the old county courts was left their common-law jurisdiction, while the supreme court retained control over them all, as alike the tribunal of final resort in matters relating to common law, probate and equity.<sup>1</sup>

12. **These American probate tribunals, or substitutes for the English spiritual courts, being of statute creation, their jurisdiction and practice are defined at much length in the several States by legislative enactment.**<sup>2</sup>

lowed as of course. 2 Bl. Com. 494. This ecclesiastical or spiritual jurisdiction, attended as it was with flagrant abuses, doubtless inspired dread and disaffection in the temporal courts and among the English laity; for restraints were put repeatedly, by statute or judicial construction, upon the ordinary's authority, even in cases where he strove to enforce justice, and the necessity of probating wills was reduced to the narrowest limits. See Colquhoun Rom. Civ. Law, §1413.

<sup>1</sup> Such is the general origin of probate jurisdiction in the United States. But the local courts thus clothed with primary authority respecting wills and administration have borne different names and varied as to procedure in many details, in accordance with the local codes. In New England and in most of the Western States whose legislation bears the impress of New England ideas, each county has its appropriate court and judge of probate; in New York we find the county surrogate; in New Jersey an orphans' court or ordinary; in Pennsylvania and various other States an orphans' court; while in some parts of this country, and particularly the pioneer region, probate functions are still exercised by the general parish or county tribunals. For convenience we shall in this treatise speak of all such tribunals as "courts of probate" (such being perhaps the most familiar designation), and the law pertaining to this jurisdiction over estates of deceased persons as "probate law." Such courts have a judge or surrogate who performs the appropriate judicial duties and a register who records the wills, letters and accounts, for public inspection, and performs other duties corresponding more nearly usually to those of a clerk of courts. Probate courts and their officers constitute a part of the local judiciary system of each State; yet the functions performed by judge and register are in many respects analogous to those of administrative officers. See 2 Kent Com. 226, 227.

<sup>2</sup> American policy demands that estates of the dead, if not really trivial in character or amount, shall pass through the probate office for the benefit of all parties interested;

13. Probate jurisdiction in the United States is exercised with great simplicity of form as well as decorum. Costs and fees are trifling; the mode of procedure is by a simple petition which states the few facts essential to give the court jurisdiction; in various counties the needful blanks may be obtained from the register; and of so informal a nature is the hearing before the judge or surrogate that parties appear often without legal counsel, the usual aspect of a probate court-room in the rural counties being that of some executive office where business is summarily disposed of.<sup>1</sup>

that, under the scrutiny of the court, they shall be wound up regularly, expeditiously, and economically, by representatives whose credentials of authority are procured from the proper county tribunal, and upon the filing of due security; that wills, whether relating to personal, real, or mixed property, shall be presented for probate as soon after the testator's death as decency permits; that the rights of all persons interested in a dead person's estate, including creditors, legatees, and next of kin, shall be sedulously protected, whether one died testate or intestate; and that, so far as may be convenient, testaments, inventories, the accounts of executors or administrators, and other essential documents showing the condition and course of settlement of each deceased person's estate shall be preserved for inspection in the county probate files, and made matter of public registry; though practically, if the representative be duly qualified, and the will or the fact of intestacy clearly placed on record, the bond of the representative affords security to all concerned that any omission to render an inventory and accounts need not work them an injury if private and family considerations hinder the pursuit of those full formalities.

<sup>1</sup> In many parts of the United States probate courts are pronounced courts of record; apart from which, to authenticate wills, qualify executors and administrators, and supervise the settlement and distribution of the estates of deceased persons, affords to all such local tribunals an independent and highly responsible sphere of judicial action, exclusive in the first instance. In the construction of testamentary trusts, and upon various other subjects probate courts exercise often a concurrent authority with those of equity; and in general the right of appeal from their decrees to the final State tribunal, though exercised comparatively seldom, gives assurance that the delicate discretion reposed in these temporal magistrates will not be seriously abused. And yet, important as must be the functions of these probate judges, public registry is the prominent feature of our county probate offices, if not of probate jurisdiction; and for system and care in preserving the public records, the judge, as well as the register, may be held responsible in a certain ministerial capacity. See *e. g.* *Thompson v. Holt*, 52 Ala. 491.

Probate law and practice as concerning the United States, must, in the main, be studied with reference to the judicial system of each particular State. Some of the more important points of practice will be incidentally noticed under appropriate heads in the course of the present treatise. See also such practical works upon local State probate law as are published occasionally.

The register, in some States, appears capable of exercising some judicial functions of a routine character by way of deputy. *Wickersham's Appeal*, 75 Penn. St. 334; *Thornton v. Moore*, 61 Ala. 347, 98 N. W. 1902. But, in general, the register's duties are ministerial or corresponding to those of a clerk of courts and custodian of records. He may be elected by the people, notwithstanding the power to appoint judicial officers is vested by the State constitution in the governor. *Opinion of Justices*, 117 Mass. 603.

A judge of probate should not grant administration in an estate in which he is personally interested; and local statutes generally provide for all contingencies by allowing the judges of different counties to hold court for one another. *Sigourney v. Sibley*, 22 Pick. 507. Or by removal from the county to another court. *Burks v. Bennett*, 55 Tex. 237.

14. **The latest probate jurisdiction in England** follows our model. In many branches of jurisprudence, doubtless, American legislators draw their inspiration from abroad; but, for probate as well as matrimonial law, the United States may be regarded as preceptor to the mother country.<sup>1</sup>

15. **The conflicting laws of various countries give rise to perplexing inquiries incidental** to the settlement of an estate, which must be solved on the principles of comity. As respects the estate of any deceased person, the general rule is that the law of the place of his last domicile, rather than the law of the place of his birth, or of the place where he happened to die, or of the place where the personal property was situated, shall prevail. And, if all circumstances favor, the sole, or at least the principal grant of letters ought to be taken out and the will proved, in the country, the State, and indeed the very county, where one was a domiciled inhabitant at the time of his death. But local sovereign law does not always give way to the law of the last domicile, where assets belonging to the deceased person's estate lie within the local sovereign jurisdiction, and strict compliance with the foreign law would prove detrimental to the local interests.

As to concurrent jurisdiction of local probate and chancery courts, subject, of course, to local legislation, see *Search v. Search*, 27 N. J. Eq. 137; *Catlin v. Wheeler*, 49 Wis. 507, 5 N. W. 935; *Butler v. Lawson*, 72 Mo. 227; *Verplanck, Re*, 91 N. Y. 439; *N. E. Trust Co. v. Eaton*, 140 Mass. 532, 54 Am. Rep. 493, 4 N. E. 69. A probate court must not entertain proceedings beyond its statutory functions. *Winton's Appeal*, 111 Penn. St. 387, 5 A. 240.

<sup>1</sup> By the English Statute of 20 & 21 Vict. c. 77 (A. D. 1857), that jurisdiction which ecclesiastical courts formerly exercised in Great Britain has been transferred to a new tribunal known as the Court of Probate, and the authority of the ordinary, as well as of the old manorial and other peculiar courts, is entirely superseded. All causes relating to the grant and revocation of probate of wills and of administration within English jurisdiction are, by that enactment, vested in the new tribunal—a temporal court whose grants and orders have full effect throughout all England, and in relation to the personal estate in all parts of England of deceased persons; and this court of probate is declared a court of record. Act 20 & 21 Vict. c. 77; *Wms. Exrs.* 7th Eng. ed. 290, 294, 312, 323, 344. The old ecclesiastical tribunals are thus supplanted.

Appeal lies from this court of probate to the House of Lords: the privy council having formerly exercised the final jurisdiction in causes testamentary. Courts of equity are courts, as before, for the construction of wills; and so formerly, in concurrence, were the ecclesiastical courts; but the new court of probate is expressly forbidden to exercise such jurisdiction; and no suits for legacies, nor for distribution of a residue can be brought therein. Bonds, inventories, and accounts are rendered to the court of probate; the place for depositing wills is under its control; and calendars are kept in its principal registry, district registries being established according to its direction. Act 20 & 21 Vict. c. 77, with amendment, 21 & 22 Vict. c. 98; *Wms. Exrs.* 298, 301, 315, 320, 573.

The English probate practice, though simplified certainly by this later legislation is still, however, more costly and burdensome apparently than that of most American States, and is less identified with county tribunals and the local neighborhood of the decedent. See *Charter v. Charter*, L. R. 7 H. L. 364; *ib.* 24 W. R. 874.

15a. (1) **Domiciliary letters testamentary or of administration confer no authority as such outside the jurisdiction of the State or country in which they were originally issued; and if the representative is permitted to collect effects, or to sue for assets, in an external jurisdiction, it is because of a favor extended to him, and not his right.**<sup>1</sup>

15b. (2) **With regard to the administration of foreign assets, the prevailing American doctrine favors the law of the State or country where the assets are situated, over that of the last domicile, or at least equally to it, so far as regards creditors of the estate; it being a rule of public convenience, that property of the deceased within reach of the domestic process shall be applied to the liquidation of debts in consonance with domestic policy.**<sup>2</sup>

16. (3) **But as to the payment of legacies or the general distribution of the residue of one's personal estate, after debts and claims are satisfied, comity highly respects the law of the last domicile of the deceased.**<sup>3</sup>

<sup>1</sup> The requirement is, as local laws frequently provide, that probate of the will (if there be one) shall be made in the jurisdiction thus invaded; and often that there shall be a local qualification of some sort and local letters taken out, if not by the principal executor or administrator, by some local person as his attorney or substitute. The due probate of a will in the original jurisdiction is, to be sure, often respected by the law of other States or countries, as in permitting evidence by exemplified copy from the original probate record to suffice for proof. But as respects mere administration on an assumed intestacy, the fact of local assets, or of some local necessity for conferring a local probate appointment, may serve for invoking with ancillary letters the local jurisdiction. *Price v. Dewhurst*, 4 M. & Cr. 76, 80; 13 Pick. 8; *Campbell v. Wallace*, 10 Gray, 162; *Wood v. Matthews*, 73 Mo. 477; 34 Ark. 117; 85 N. W. 976, 110 Wis. 296; *Mansfield v. McFarland*, 51 A. 763, 202 Pa. 173; *Taylor v. McKee*, 48 S. E. 943, 121 Ga. 223; *Brown v. Smith*, 64 A. 915, 101 Me. 545, 115 Am. St. Rep. 359. Not always waiting for a domiciliary appointment abroad, the practical convenience of creditors and citizens in its own jurisdiction will be steadily regarded, provided there be assets at hand whose owner has deceased. *Wms. Exrs.* 362, 430; 2 M. & Cr. 89; 2 Kent Com. 434. And see *Story Conf. Laws*, §§ 512, 513, and numerous cases cited. See 162 *et seq.*, *post*.

<sup>2</sup> 5 Cranch, 299, 3 L. Ed. 104; *Smith v. Union Bank*, 5 Pet. 523, 8 L. Ed. 452; *Holcomb v. Phelps*, 16 Conn. 127; *Story Conf. Laws*, §§ 480, 481, 524. As to the English doctrine cf. *Wilson v. Lady Dunsany*, 18 Beav. 293; *Carron Iron Co. v. MacLaren*, 4 H. L. Cas. 455. See also *Goodall v. Marshall*, 11 N. H. 88, 35 Am. Dec. 472; *McClung v. Sieg*, 46 S. E. 210, 54 W. Va. 467, 66 L. R. A. 884. A State or country inclines to uphold its own priorities as to taxes and other public claims; though, as among general claimants, in case the estate, as a whole, proves insufficient to pay them in full, comity seeks apparently, in modern times, to so adjust the estate in different jurisdictions as to make a *pro rata* settlement of claims as a whole, and not expend all in paying claims of domestic citizens to the prejudice of foreign creditors. *Mitchell v. Cox*, 22 Ga. 32, 68 Am. Dec. 481; *Normand v. Groggnard*, 14 N. J. L. 425; 8 Pick. 475. *Post* 162 *et seq.* The tendency of modern legislation in this last respect, which we gather from local statutes, is by no means selfish; for it is yielding much not to appropriate local assets to the satisfaction first of local creditors.

<sup>3</sup> 6 Bro. P. C. 566; *Crispin v. Doglioni*, 3 Sw. & Tr. 98; s. c. L. R. 1 H. L. 301; *Holmes v. Remsen*, 4 John. Ch. 460, 8 Am. Dec. 581; *Ennis v. Smith*, 14 How. (U. S.) 400, 14 L. Ed. 472; *Wms. Exrs.* 1515; 10 Pick. 77; *Crum v. Bliss*, 47 Conn. 592; *Russell*

17. (4) **Furthermore, and from similar considerations, the law of the place of last domicile regulates** as to the execution and validity of wills of personal property. Wherever local assets may be found, the will of a deceased person, in order to operate thereupon, must have conformed to the law in force where he had his last domicile, and must be there entitled to probate.<sup>1</sup> And the law of one's last domicile not only decides what constitutes one's last will, but whether one died testate in point of fact or intestate.<sup>2</sup> All questions as to the forms and solemnities attending a due execution are therefore to be referred to the place of last domicile.<sup>3</sup>

18. (5) **As to the accountability of the executor or administrator for assets** therein received, and the faithful or unfaithful discharge of his duties, the law of the place of appointment, principal or ancillary, governs.<sup>4</sup>

19. (6) **Movables or personal property, not real estate,** we thus consider. As concerns the transmission of real estate, and rights and formalities of title thereto, the law of local situation in general

*v. Madden*, 95 Ill. 485; *Grote v. Pace*, 71 Ga. 231; 40 N. J. Eq. 14; *Apple's Estate*, 66 Cal. 432, 6 P. 7; 96 N. C. 139, 2 S. E. 225. For all such dispositions of the surplus being at the sole discretion of a decedent, either as manifested by his last will and testament, if he has left one, or as defined under the will drawn up for him by the legislature of his own last domicile, so to speak, which every intestate may be presumed to have accepted in lieu of other express testamentary provisions on his own part, it is but just to give that express or implied will due effect in every country where the estate of the deceased may happen to be situated. *Story Conf. Laws*, § 481; 2 Ves. Sen. 37; *Crispin v. Doglioni*, L. R. 1 H. L. 301. See 162 *et seq.*, *post*.

The local law does not, in such instances give way to the law of the foreign country; but rather adopts, as part of its own law, the doctrine that distribution of the surplus of personal property shall be according to the law of the owner's last domicile. The law of the last domicile, as it stands at the time of an intestate's death, is taken by the local courts; with a liberal discretion, however, as to the true interpretation of that law, and a disposition to thwart injustice. *Doe v. Vardill*, 5 B. & C. 452; *Wms. Exrs.* 1516; *Lynch v. Paraguay*, L. R. 2 P. & D. 268; *Wright v. Phillips*, 56 Ala. 69; 76 Ala. 441, 52 Am. Rep. 344. And the special rights of a widow, too, by way of allowance and the like, should be determined by the law in force at the death of her husband in the place of his last domicile. *Leib v. Wilson*, 51 Ind. 550; *Mitchell v. Word*, 64 Ga. 208; *Taylor v. Pettus*, 52 Ala. 287.

<sup>1</sup> *Crispin v. Doglioni*, 3 Sw. & Tr. 96; s. c. L. R. 1 H. L. 301; 3 *Story*, 755; 4 *Kent Com.* 513, 514; *Harrison v. Nixon*, 9 Pet. 483, 9 L. Ed. 201; 4 *Greenl.* 139; *Story Conf. Laws*, §§ 465-468; 3 *Hagg.* 374.

<sup>2</sup> *Moultrie v. Hunt*, 23 N. Y. 394. But as to regarding foreign rules of evidence in establishing a will, see *Story Conf. Laws*, §§ 260, 634, 636; *Wms. Exrs.* 372.

<sup>3</sup> *Schultz v. Dambmann*, 3 *Bradf. Sur.* 379; *Story Conf. Laws*, § 465; *Laneville v. Anderson*, 2 Sw. & Tr. 24; 30 L. J. N. S. Prob. 82. See *Dupuy v. Wurtz*, 53 N. Y. 556 (making a will valid, and then changing to a domicile where invalid). Cf. *Story* § 473. As to law in force when will becomes operative, see *Trotter v. Trotter*, 4 *Bligh N. S.* 4502; 3 Sw. & Tr. 24; *Harrison v. Nixon*, 9 Pet. 483, 9 L. Ed. 201; *De Peyster v. Clendinning*, 9 *Paige*, 295; *Story Conf. Laws*, § 479; 1 *Bradf. Sur.* 252; *Cushing v. Aylwin*, 12 *Met.* 169. But see *Kurtz v. Saylor*, 20 *Penn. St.* 205. And see *post* as to statute changes, 20.

<sup>4</sup> *Partington v. Attorney General*, L. R. 8 H. L. 100, 119; *Kennedy v. Kennedy*, 8 Ala. 391; *Fay v. Haven*, 3 *Met.* 109; 5 *Barb.* 73; *Marion v. Titsworth*, 18 *B. Mon.* 582.

prevails instead. Hence, the rule that a will of real estate or of fixed and immovable property must be governed by the law of local situation, and can only operate so far as it conforms to that law.<sup>1</sup>

20. (7) **Treaty stipulations or a local statute** may vary all such general rules of comity.<sup>2</sup>

21. **Our common law fixes the domicile** mainly from regard to one's home and the place where he exercises political rights.<sup>3</sup> Domicile may thus be regarded as the place where one has his true, fixed, and permanent home and principal establishment, and

<sup>1</sup> Story Conf. Laws, § 474; 1 Vern. 85; 4 Kent Com. 513; 9 Wheat. 565, 6 L. Ed. 161; *Potter v. Titcomb*, 22 Me. 303; *Robertson v. Pickrell*, 109 U. S. 608; 38 N. J. Eq. 516; *Croly v. Clark*, 20 Fla. 849. In the title of a mortgage upon land the local administrator has been preferred to one appointed in the State where the mortgagee died. *Reynolds v. McMullen*, 55 Mich. 568, 54 Am. Rep. 386, 22 N. W. 41. Cf. 36 Kan. 271, 59 Am. Rep. 550, 13 P. 337; *Clark v. Blackington*, 110 Mass. 369. The local court claims the right to construe a devise of local lands. *McCartney v. Osburn*, 118 Ill. 403, 9 N. E. 210. This local law applies to formal characteristics of a will, mode of execution, capacity or incapacity and formal revocation. *Evansville Ice Co. v. Windsor*, 148 Ind. 682, 48 N. E. 592. And, on the other hand, if there be no will thus operative to transmit the title, the descent of such real estate or immovable property must be in accordance with the law of that local jurisdiction. The court of one State or sovereignty has no inherent power to order lands to be sold in another State or sovereignty or to control the title thereto. *Boyce v. Grundy* 9 Pet. 275, 9 L. Ed. 27. See Part VI, *post*.

The law of local situation may determine the character of property in this connection, as being real or personal. Story Conf. Laws, § 447; *Chapman v. Robertson*, 6 Paige, 630, 31 Am. Dec. 264. Nevertheless, comity respects the law of testamentary domicile so far as to enable property to go in the one character or the other, as the testator obviously intended. *Enohin v. Wylie*, 10 H. L. Cas. 1; *Jerningham v. Herbert*, 4 Russ. 388. Very embarrassing questions may arise where real and personal estate are so combined in the same will that the laws of different sovereign jurisdictions must be applied. Story Conf. Laws, §§ 485-489; *Brodie v. Barry*, 2 Ves. & B. 130, *per* Sir Wm. Grant.

<sup>2</sup> Particularly where the effect is to enlarge the usual generosity. See 2 Curt. 855; 3 Curt. 231; *Wms. Exrs.* 368. In various American States it is now provided that a will made out of the State, which is valid according to the laws of the State or the country in which it is made, may be proved and allowed with the same effect as if executed according to the law of the State. See *Bayley v. Bailey*, 5 Cush. 245; *Slocomb v. Slocomb*, 13 Allen 38 (foreign nuncupative will, valid where made). And see *Ives v. Salisbury*, 56 Vt. 565; *Wms. Exrs.* 374; *Dupuy v. Wurtz*, 53 N. Y. 556. See also *Reid, Re*, L. R. 1 P. & D. 74 (statute as to changing domicile); *Shannon v. Shannon*, 111 Mass. 331 (foreign real estate). And see 162 *et seq.*, *post*.

<sup>3</sup> Domicile may be viewed as national or domestic; the one having reference to the person's country or sovereignty; the other to a political subdivision thereof, such as the county. It is the latter which determines the taking of jurisdiction as between probate county courts; but the former, when international rules are under discussion. 2 Kent Com. 449; Story Conf. Laws, §§ 39 *et seq.*, 42. The bias of the courts is found to differ in these two classes of cases; for, in the latter class, the domestic forum of last resort sits as umpire, while in the former there is no umpire, and nothing is yielded except it be in the spirit of comity. Moreover, a change of domicile in the one instance involves conformity to a new and independent system of laws, while in the former it does not. In the United States, the law of domicile develops still greater perplexities; for there is the national domicile, which, however, is little concerned with the estates of deceased persons; the State domicile, which, for most practical purposes, is sovereign in this connection; and the domestic or county domicile.

to which, whenever he is absent, he has the intention of returning.<sup>1</sup> And one's last domicile—the prime fact upon which turn those legal issues involved in the administration and settlement of his estate—is taken to be his fixed and permanent home at the time of his decease.<sup>2</sup>

22. Were the question of one's domicile raised only, while he was living, it would be comparatively easy for his intention to be established; as where, for instance, the case relates to taxation and one gives his own testimony. But death leaves the question of last domicile to be chiefly inferred from extraneous facts and circumstances; each probate tribunal, moreover, which is asked to take jurisdiction upon a dead person's estate, naturally inclines to do so, and to construe all legal doubts in its own favor.<sup>3</sup>

23. Last domicile disregards the place of death, if the death occurred on transit, or otherwise at a distance from one's home.<sup>4</sup>

<sup>1</sup> Bouv. Dict. "Domicile"; Thorndike v. Boston, 1 Met. 245.

<sup>2</sup> Every one has a domicile; and the elements which establish that domicile are more easily conceived by the common mind than reduced to a close legal analysis. Domicile is impressed upon the new-born child by birth, and upon the wife by her marriage; the domicile of the child follows that of its parents, and the domicile of the wife follows that of her husband. Any person *sui juris*, however, may make a *bona fide* change of domicile at any time. Nevertheless, one's original domicile continues until another is acquired with a genuine full and free intention of making it one's permanent home. Bouv. Dict. "Domicile"; Gilman v. Gilman, 52 Me. 165, 83 Am. Dec. 502; Story Conf. Laws, § 45; Wms. Exrs. 1517.

Legal residence or inhabitancy is often used in our local legislation as though synonymous with domicile; but these terms are not, strictly speaking, convertible. But a residence or inhabitancy, originally temporary and intended for a limited period, may afterwards become general and unlimited in its character. In all such connections the intention of the person must be studied throughout in the light of consecutive events. Such intention is manifested from conduct and circumstances, and not from words alone; intention may change; and when the two things concur, the fact of a changed residence, and the voluntary intention of remaining there, or at least of never returning to the former domicile, the domicile is legally changed. Bouv. Dict. "Domicile"; Udney v. Udney, L. R. 1 H. L. Sc. 458; Story Conf. Laws, § 45; Wilbraham v. Ludlow, 99 Mass. 587; Krone v. Cooper, 43 Ark. 547; Huldane v. Eckford, L. R. 8 Eq. 640. See Colt, J., in Hallet v. Bassett, 100 Mass. 170, that change of domicile does not depend so much upon the intention to remain in the new place for a definite or indefinite period, as upon its being without an intention to return. But Lord Westbury speaks of the inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there "for an unlimited time." L. R. 1 H. L. Sc. 458. And see King v. Foxwell, L. R. 3 Ch. D. 518.

<sup>3</sup> In such a controversy, the presumption that one domicile shall prevail until another has been *bona fide* and voluntarily acquired in its stead, should be allowed great weight; and, more especially, if to concede a change thereof is to concede that the person intentionally expatriated himself and fixed his residence in another country, where opposing systems of law must of necessity define the rights of succession. For it is a general maxim that, though one may have two domiciles for certain purposes, he can have only one for the purpose of succession. 5 Ves. 786; Crookenden v. Fuller, 1 Sw. & Tr. 441; Green v. Green, 11 Pick. 410; Wms. Exrs. 1518; 2 Kent Com. 431.

<sup>4</sup> Thus, in case one dies while travelling abroad, the foreign country should take no jurisdiction, unless it be ancillary merely and founded upon the possession of prop-

24. Since administration is of universal convenience, the courts of one country or State do not feel compelled to wait until those of another have acted, nor to submit domestic claims to foreign jurisdictions; but, aside from the deceased person's last domicile, and possibly a principal probate appointment, a competent local and ancillary appointment is procurable, on the suggestion that property requiring administration lies within the local jurisdiction. In other words, locality of personalty belonging to the estate of a deceased person may confer a local probate jurisdiction regardless of the consideration of his last domicile.<sup>1</sup> So, too, within the same national or sovereign jurisdiction, the locality of personal property may afford in various instances occasion for probate jurisdiction in two or more local courts; as where one dies intestate, being domiciled abroad, and leaves effects in the county of A and the county of B.<sup>2</sup>

erty which he has there. See 2 Curt. 241. As to removing from one State to another and dying on the way, cf. *Burnett v. Meadows*, 7 B. Mon. 277; *George v. Watson*, 19 Tex. 354; *Briggs v. Rochester*, 16 Gray, 337; *State v. Hallett*, 8 Ala. 159; *Olson's Will*, 63 Iowa, 145, 18 N. W. 854. The State or country where one died is sometimes favored in case of doubt. 2 Dev. 73. If the domicile left were an acquired domicile, the domicile of origin would revive, by the English theory. See *Lyll v. Paton*, 25 L. J. Ch. 746; *Udny v. Udny*, L. R. 1 H. L. Sc. 458.

Questions of this character are, however, seldom raised with reference to administration; and the courts of a State or country do not appear unwilling to maintain the domestic sovereign jurisdiction to grant letters upon the estate of a decedent where it appears convenient to do so, provided some claim may be set up that the last domicile or residence was within such limits; or, if a jurisdiction can be founded upon the locality of assets. See local statutes, using such words as last "residence," "inhabitaney," etc.

<sup>1</sup>This general doctrine is amply recognized in the statutes of England and the several United States which relate to probate jurisdiction. See *post*, Part II, c. 7. And see *Ewing v. Ewing*, 9 App. Cas. 34, 39.

<sup>2</sup>A convenient rule, sanctioned by some local statutes is that when a case lies within the jurisdiction of the probate court in two or more counties, the court which first takes cognizance thereof by the commencement of proceedings shall retain the same; and administration first granted shall extend to all the estate of the deceased in the State, and exclude the jurisdiction of the probate court of every other county. Stat. 20 & 21 Vict. c. 77; Mass. Gen. Stats. c. 117, § 3; *King's Estate*, 75 N. W. 187, 105 Iowa, 321; 87 P. 87, 149 Cal. 485 (public administrator).

Debts due the deceased may be deemed *bona notabilia*, or personalty suitable for conferring a local probate jurisdiction. As to debts, see *Attorney General v. Bouwens*, 4 M. & W. 191; *Vaughan v. Barrett*, 5 Vt. 333, 26 Am. Dec. 306; *Pinney v. McGregory*, 102 Mass. 186; 36 S. E. 125, 126 N. C. 626; 66 P. 971, 135 Cal. 14, 87 Am. St. Rep. 90. As to stock, see *Fitch's Estate*, 54 N. E. 701, 160 N. Y. 87 (location of company's property); *Richardson v. Busch*, 95 S. W. 894, 198 Mo. 174, 115 Am. St. Rep. 472; 66 P. 971, 135 Cal. 14, 87 Am. St. Rep. 90. As to life insurance money, see *Butson, Re*, 9 L. R. Ir. 21; 29 N. Y. Supr. 75; *Wyman v. Halstead*, 109 U. S. 654, 27 L. Ed. 1068. Cf. 100 Tenn. 177, 43 S. W. 766. So as to any chose in action or money right, or *bona fide* claim, this being personal property and assets. *Murphy v. Creighton*, 45 Iowa, 179; 16 Hun (N. Y.) 434; 17 N. Y. Supr. 123; 85 P. 445. Modern kinds of incorporeal personal property may furnish disputes as to their locality for such a purpose, which the courts have not as yet clearly settled. Where the personal property consists of a debt owing upon some security or document of title, which of itself is



25. Strict construction would seem to refer the locality of personality in such cases to the *situs* as existing at the time of the deceased owner's or creditor's death. Such an interpretation, however, is too narrow to meet the practical needs of a probate appointment for local purposes in modern times; an appointment which perhaps may not be invoked for years after one's death.<sup>1</sup>

commonly transferable as possessing a mercantile value, the local situation of such security or document of title would, in various instances, be well held to confer a probate jurisdiction, as of *bona notabilia*, apart from the obligor's or debtor's place of residence; as where, for instance, a savings-bank book, coupon-bond, life insurance policy, certificate of stock, or perhaps a promissory note were left lying in another jurisdiction. *Beers v. Shannon*, 73 N. Y. 292. As to negotiable notes, see, also, *Goodlett v. Anderson*, 7 Lea, 286; but cf. *Owen v. Miller*, 10 Ohio St. 136. The rule is a very old one that specialty debts are *bona notabilia* where the bond or other specialty is; the distinction made being that debt upon simple contract follows the person of the debtor. *Cro. Eliz.* 472; *Swinb. pt. 6, § 11*. As to United States bonds deposited for safe keeping by a citizen of another State, upon a special certificate of deposit transferable by indorsement, see *Shakespeare v. Fidelity Insurance Co.*, 97 Penn. St. 173. However this may be (and the inclination of each State or country is to uphold its own jurisdiction), a jurisdiction founded upon the place where the obligation is enforceable is still sustained, whether as concurrent or exclusive; thus shares of stock are held *bona notabilia* in the county and State where the stock books are kept and dividends paid. *Russell v. Hooker*, 67 Conn. 24, 35 L. R. A. 459, 34 A. 711; *Arnold v. Arnold*, 62 Ga. 627; *Emery v. Hildreth*, 2 Gray, 231; *Owen v. Miller*, 10 Ohio St. 136; cf. *Goodlett v. Anderson*, 7 Lea, 286. And see, as to a mortgage note where the note and its security are enforced in a certain jurisdiction, *Clark v. Blackington*, 110 Mass. 369, 373. Cash, furniture, and corporeal chattels are of course *bona notabilia* where they lie. See 2 Demarest (N. Y.) 265 (a folding-chair).

If an assignment be given as collateral security for a debt of the assignor, the debt is the asset, and the assignment only incident. If an assignment be absolute, it should be regarded only as a muniment of title which follows the *situs* of the specialty or other thing assigned. And so, as it is said, of a corporeal chattel; a bill of sale transferring that chattel follows the *situs* of the chattel as the thing happens to lie. *Holyoke v. Mutual Life Ins. Co.*, 29 N. Y. Supr. 75, 77, *per* Gilbert, J. See *post*, Part II, c. 7.

Wherever the local statute has prescribed a jurisdiction without limitation of value, articles or money rights of trifling consequence will uphold the local part of administration. *Emery v. Hildreth*, 2 Gray, 231; *Wilkins v. Ellett*, 108 U. S. 256, 27 L. Ed. 718; 2 Demarest, 265.

No ancillary appointment on ground of assets once within jurisdiction, but already taken by domiciliary administrator. 82 N. Y. S. 180; *McCabe, Re*, 69 N. E. 1126, 177 N. Y. 584.

<sup>1</sup> Hence, for the welfare of creditors and other interested parties, this right of local appointment is more liberally asserted in many courts, and local jurisdiction is upheld on the ground that *bona notabilia* exist when letters are applied for, notwithstanding the goods were brought into the country, or the debtor removed thither subsequently to the death of the owner or creditor. See *Pinney v. McGregory*, 102 Mass. 186, *per* Gray, J.; *Scarth v. Bishop of London*, 1 Hagg. Ecc. 636; 16 Hun (N. Y.) 434. This seems the better opinion, unless such bringing in or removal was in bad faith, and with the intention of conferring improperly a colorable probate jurisdiction. Cf. *Christy v. Vest*, 36 Iowa, 285; *Goodlett v. Anderson*, 7 Lea, 286. And see 2 Tenn. Ch. 176; *Wells v. Wells*, 35 Miss. 638; *Hoes v. N. Y., N. H. & H. R.* 173, 66 N. E. 119, 173 N. Y. 435; 59 S. E. 912, 129 Ga. 676, 121 Am. St. Rep. 237. According to the modern current of opinion, moreover, *bona fide* letters of administration issued from a court of competent authority upon the estate of a deceased person non-resident, will be presumed in all collateral proceedings to have been properly granted. *Hobson v. Ewan*, 62 Ill. 146; Appointment, Part II, c. 6, *post*. See statute provision, *Watkins v. Adams*, 32 Miss. 333.

25a. With the growth of our country, corporations having interstate business expand. The inconveniences and hardships resulting from the necessity on the part of creditors or claimants, of going to distant places to bring suits on contracts, and from the additional requirement, in case of death, of taking out letters testamentary or of administration at the original domicile of the corporation debtor, in order to sue, has led to the enactment in many States of statutes which enable resident creditors to bring suits there against corporations created by the laws of other States.<sup>1</sup>

26. A right of action created by statute in one State or country is not to be regarded as property or assets which can confer a local probate jurisdiction in another State or country.<sup>2</sup>

27. Locality of real estate may often confer a jurisdiction to appoint an administrator in various American States.<sup>3</sup> Administration may, indeed, be granted upon the basis of real property alone, under suitable circumstances.<sup>4</sup>

28. Various constitutional points have been raised in our several State courts, most of which are referable to familiar principles.<sup>5</sup>

29. In the United States, each State regulates the settlement of estates in its own jurisdiction, and no administration is extra-territorial. In each State, accordingly, estates may be settled

<sup>1</sup> *N. E. Mutual Life Ins. Co. v. Woodworth*, 111 U. S. 138, 144, 28 L. Ed. 379; 12 Wall, 65, 20 L. Ed. 354; 96 U. S. 369, 24 L. Ed. 853; 104 U. S. 5, 26 L. Ed. 643.

<sup>2</sup> As where the representative of a person whose death was caused by the wrongful act or negligence of another is permitted, contrary to the common-law rule, to sue and recover damages. *Illinois Central R. v. Crazin*, 71 Ill. 177.

As to permitting the court of a county where a non-resident of the State is killed to appoint an administrator there to prosecute a statutory action for the injury causing such death, see 50 S. E. 860, 138 N. C. 460; *Missouri Pacific R. v. Bradley*, 51 Neb. 596, 71 N. W. 283 with conflicting authorities cited; 68 Mich. 33, 35 N. W. 829; 36 Conn. 213; 102 Mass. 786; 53 Ill. 224; 29 Kan. 420; 26 Ind. 477; *DeValle v. Southern Pac. R.*, 160 F. 216 (any jurisdiction where defendant may be sued); 68 A. 481, 28 R. I. 460, 18 L. R. A. (N. S.) 1252. A claim of damages for death from negligence is local assets sufficient for granting administration. 40 So. 280, 144 Ala. 192.

<sup>3</sup> 19 Wend. 378; *Apperson v. Bolton*, 29 Ark. 418; *Prescott v. Durfee*, 113 Mass. 477; *Sheldon v. Rice*, 30 Mich. 296, 18 Am. Rep. 136; *Rosenthal v. Remick*, 44 Ill. 202; *Beasley v. Howell*, 117 Ala. 499, 22 So. 989; *Lees v. Wetmore*, 58 Iowa, 170 12 N. W. 238. But cf. *Beach's Appeal*, 55 A. 596, 76 Conn. 118 (not owned by decedent).

<sup>4</sup> For the local policy is, while granting letters, as, of course, with a primary reference to settling a decedent's personal estate, to license a sale of real estate in case the personalty proves insufficient; and the local appointment simply puts local creditors in a position to thus assert their rights against the real estate, without determining of itself whether the land shall actually be sold or not. *Temples v. Cain*, 60 Miss. 478; *Moore v. Moore*, 33 Neb. 509, 50 N. W. 443. See Part VI, *post*.

<sup>5</sup> See as to "impairing the obligation of contracts," *Deichman's Appeal*, 2 Whart. 395, 30 Am. Dec. 271. And see *Place v. Oldham*, 10 B. Mon. 400. A special act of the legislature may change the administration of an estate from one county to another. *Wright v. Ware*, 50 Ala. 549. And see 1 Bradf. Sur. (N. Y.) 200; *Hull v. Neal*, 27 Miss. 424; *McGovney v. State*, 20 Ohio, 93.

and claims proved under the State laws. Whatever may be done with the final balance, as between a domiciliary and ancillary jurisdiction, a dead person's estate must be administered under the probate laws and system of the State granting letters, up to the time of distribution, or until adjudication is made as to the final balance, or at least the payment of legacies.<sup>1</sup>

**29a. Only parties in immediate interest, agreeably to the preferences defined or indicated by local statutes, can be regarded as having a standing to litigate or appeal in matters of probate and administration.<sup>2</sup>**

<sup>1</sup> As to federal courts, see *Dickinson v. Seaver*, 44 Mich. 624, 7 N. W. 182; *Broderick's Will*, 21 Wall, 503, 22 L. Ed. 599; *Ellis v. Davis*, 109 U. S. 485, 27 L. Ed. 1006 (no interference); *Byers v. McAuley*, 149 U. S. 608, 37 L. Ed. 867; 21 Wall. 276, 22 L. Ed. 536; 112 U. S. 294, 28 L. Ed. 728. But as to federal jurisdiction in equity, see 58 Fed. 717; *Hayes v. Pratt*, 147 U. S. 557, 37 L. Ed. 279; *Colton v. Colton*, 127 U. S. 301, 32 L. Ed. 138 (construction); 52 Fed. 417; 61 Fed. 423; 134 U. S. 47, 33 L. Ed. 405. Local statutes may confer jurisdiction. 111 U. S. 138, 144, 28 L. Ed. 379.

<sup>2</sup> *McCutchen v. Loggins*, 19 So. 810, 109 Ala. 457; *Jones v. Smith*, 48 S. E. 134, 120 Ga. 642. This will appear more fully in the course of our investigation.

## PART II.

APPOINTMENT AND QUALIFICATION OF EXECUTORS  
AND ADMINISTRATORS.

## CHAPTER I.

## APPOINTMENT OF EXECUTORS.

30. While in modern times it cannot be strictly said that the designation of a particular executor is essential in order to constitute a will, every executor doubtless derives his authority from such an instrument. An executor should in fact be defined as one to whom the deceased has duly committed the execution or putting in force of his last will and testament; or, in other words, the settlement of his estate.<sup>1</sup>

31. Whenever the testator nominates an executor, this is enough to make his instrument a will and require its probate as such, even though no legacy be given and no special direction of a testamentary character.<sup>2</sup> Furthermore, the interest of every executor in his testator's estate is what the testator may have given him; and hence a testator may make the trust absolute or qualified respecting his property qualifying the trust as to the subject-matter, the place where the trust shall be discharged, and the time when the executor shall begin and continue to act as such.<sup>3</sup>

32. All persons, generally speaking, are capable of becoming executors who are capable of making wills.<sup>4</sup> The favor of our law extends even further in this respect.<sup>5</sup>

<sup>1</sup> 2 Bl. Com. 503; 1 Wms. Exrs. 7th Ed. 226; Bouv. Dict. "Executors"; *supra*, 3, 6.

<sup>2</sup> Lancaster's Goods, 1 Sw. & Tr. 464; Jordan's Goods, L. R. 1 P. & D. 555; 1 Wms. Exrs. 227.

<sup>3</sup> So favorably are regarded a testator's wishes that wherever one commits by will the execution of a trust to the executors named therein, no other person can execute the trust while any of the executors is living and has not declined the office of executor nor been shown to be unsuitable. *Clark v. Patterson*, 73 N. E. 806, 214 Ill. 533, 105 Am. St. Rep. 127; *Hayes v. Pratt*, 147 U. S. 557, 37 L. Ed. 279

<sup>4</sup> 2 Bl. Com. 503.

<sup>5</sup> (1) As to the wife's common law disability to make a will, and yet notwithstanding her capacity to become executrix through her husband's concurrence or performance on behalf, see Schoul. Wills, Part II, c. 3; Dom. Relations, Part II; 1 Wms. Exrs. 232-235; *Stewart, In re*, 56 Me. 300; *Lindsay v. Lindsay*, 1 Desau. 150. Local statutes greatly enlarge at the present day the married woman's rights in these as in other

33. The principle thus indicated is that, one's choice of an executor by his last will being so solemn an act, and by a person legally capable of making a choice among friends and kindred, his last wishes should be heeded. And so far has our law carried this principle as to permit persons obviously unsuitable for the trust to exercise it to the detriment of creditors and legatees, on the suggestion that the testator, at all events, must have confided in

respects. As to the capacity of a wife for such trusts where living separated from her husband, see 2 Curt. 640. And see as to administration by a wife, 106. If a wife is not legally bound on her fiduciary bond this constitutes still a practical objection to her appointment. 15 N. J. 566. But husband sometimes joins in bond. 32 Tex. 131; 45 Miss. 397.

The English canon law, like the civil, made no distinction between women married and unmarried, and hence permitted a wife to take upon her the probate without the consent of her husband. Godolph. pt. 2 c. 10, § 3; 2 Robert. 342. But such were the practical disabilities of coverture, and the necessity of joining husband and wife in suits, that chancery sometimes enjoined the wife from performing the duties of executrix. Taylor v. Allen, 2 Atk. 212. And see 2 Wms. Exrs. 233-235; English v. McNair, 34 Ala. 40. The husband cannot compel his wife to accept an executorship. 1 Wms. Exrs. 235. He may object, however, to her doing so; though it is held under English statutes that having so objected, where she was named sole executrix, the grant may be made to her attorney. Clarke v. Clarke, L. R. 6 P. D. 103. A man marrying a woman who is an executrix becomes executor in her right and as such accountable. Wood v. Chetwood, 27 N. J. Eq. 311.

(2) An infant, though not of full testamentary capacity, may, however young, and even while unborn and *in ventre sa mere* be appointed executor; our modern statutes, however, disqualifying one from performing the functions of sole executor during his minority, and granting administration *cum testamento annexo* to another until such infant shall have attained minority. Wms. Exrs. 232; 5 Co. 29 a; 2 Bl. Com. 503. See 38 Geo. III, c. 88, § 6; Christopher v. Cox, 25 Miss. 162; Schoul. Dom. Rel. § 416. Cf. Frisby v. Withers, 61 Tex. 134; Gusman's Succession, 36 La. An. 299.

(3) Whether a corporation aggregate can be executor has long been doubted. In the United States this point is usually decided adversely as to aggregate corporations in general; though companies may now be found whose charters expressly permit the exercise of such functions in connection with the care and investment of trust funds. Georgetown College v. Browne, 34 Md. 450; 33 Barb. 334. Cf. Porter v. Trall, 30 N. J. Eq. 106. Law authorizing trust company, etc., only confers domestic jurisdiction. 92 N. Y. S. 974. And see Farmers' Loan Co. v. Smith, 51 A. 609, 74 Conn. 625. A corporation sole or official, such as the mayor of London or the bishop of Exeter, may be and act as executor. And so may a co-partnership, in the sense that the individual members composing it, and not the firm collectively, shall be entitled to the trust, 6 Notes of Cas. 657; 1 Wms. Exrs. 229. As to making one's probate judge his executor. see Gregory v. Ellis, 82 N. C. 225; Ayres v. Weed, 16 Conn. 291.

(4) Non-residence does not necessarily disqualify an executor at common law. Thus an alien friend is not, by the English law, disqualified from becoming an executor; and even as to alien enemies, the rules of modern warfare regard the private interests of foreigners more generously than formerly. See 2 Wms. Exrs. 229-231 by Perkins; Co. Lit. 129 b. (as to aliens). In the United States the right of non-residents to become executors or administrators is regulated by local legislation not by any means uniform; but the better policy favors such rights, provided that adequate security be furnished for protecting the interests of parties dwelling within the State, so that, at all events, the non-resident may designate the party resident who should represent him; while, as between citizens merely of different States, any rigid rule of exclusion seems especially harsh. See McGregor v. McGregor, 1 Keyes (N. Y.) 133; Hammond v. Wood, 15 R. I. 566, 10 A. 623; 109; Cutler v. Howard, 9 Wis. 309; Sarkie's Appeal, 2 Penn. St. 157. As to refusing to take the oath of allegiance, see Vogel v. Vogel, 20 La. Ann. 181.

such a person.<sup>1</sup> Modern legislation, however, enlarges the control of probate courts over improper testamentary appointees, both as to refusing to confirm or for removing.<sup>2</sup> While, therefore, on the whole, the old law dealt tenderly with the choice of the deceased, modern statutes, and more perhaps those of the United States than of England, regard with much concern the interests of those taking rights under the will; and, instead of sanctioning temporary grants by way of supersedure for an emergency, permit rather that letters testamentary be refused or the unsuitable incumbent summarily removed from office.<sup>3</sup>

<sup>1</sup> Hence, not only might persons attainted or outlawed for political offences become executors, but even those convicted of felony; crime seldom if ever operating to disqualify one for the trust; and persons immoral or habitual drunkards were permitted to serve. 1 Wms. Exrs. 7th ed. 235, 236; Co. Lit. 128 a; 3 Bulst. 210; 1 Vern. 184; 2 Sw. & T. 143; 7 W. & S. 244; 2 B. Mon. 191. Want of integrity or of business experience not to disqualify. Smith's Appeal, 61 Conn. 420, 16 L. R. A. 538, 24 A. 273; 88 Cal. 303, 26 P. 178, 532. See also *Saxe v. Saxe*, 97 N. W. 187, 119 Wis. 557. Pruettt v. Pruettt, 32 So. 638, 137 Ala. 578.

Hence, too, poverty, or even insolvency, constitutes no legal cause at common law for disqualifying one from the office of executor; and thus have English cases insisted to the extent of compelling spiritual courts to respect the testator's choice, where the executor named had absconded, or after the probate had become bankrupt, and where legatees were left without adequate security. Swinb. pt. 5, §§ 2-10; 1 Wms. Exrs. 230; *Hathornthwaite v. Russell*, 2 Atk. 127. In consequence, however, of such hardships, the court of chancery assumed jurisdiction, and receivers may now be appointed under its direction, and the bankrupt or insolvent restrained from committing acts injurious to the estate. 1 W. Bl. 458; *Utterson v. Mair*, 2 Ves. jr. 95; 4 Price, 346; *Ellis, Ex parte*, 1 Atk. 101; *Elmendorf v. Lansing*, 4 John Ch. 562. And see *Stairley v. Babe*, 1 McMull. Ch. 22. Authority under bankrupt acts appears to be an element in such jurisdiction. This jurisdiction in the United States is aided further by local statutes which require an executor to give bonds to the probate court for the faithful discharge of his trust, either with or without sureties, as may be adjudged prudent in the interests of the estate. See *post*, c. 5. An executor who offers solvent sureties has a good right to qualify, if legally and mentally capable. *Holbrook v. Head*, 6 S. W. 592, 9 Ky. L. R. 755. Chancery, aside from such legislation, may oblige an insolvent executor, like any other trustee, to furnish security; but not because of his poverty or insufficient estate alone. 1 Eq. Cas. Abr. 238, pl. 22; 3 P. Wms. 336; 1 Wms. Exrs. 237; *Mandeville v. Mandeville*, 8 Paige, 475; *Hathornthwaite v. Russell*, 2 Atk. 126; 1 Wins. (N. C. Eq.) 41; *Bowman v. Wootton*, 8 Mon. 67; *Fairbairn v. Fisher*, 4 Jones Eq. 390.

By both the common and civil law, idiots and lunatics have been deemed incapable of becoming executors; a good reason, at the outset, being that such a person cannot determine whether to accept the trust or not; and since, furthermore, an insane person is in no condition to perform the functions of the office at all, the court may commit administration to another where the executor becomes afterwards insane. Bac. Abr. Executors, A. 5; 1 Salk. 36; 1 Wms. Exrs. 238; *Evans v. Tyler*, 2 Robert. 128, 134. See as to legislation, *McGregor v. McGregor*, 1 Keyes, 133.

<sup>2</sup> Mass. Pub. Stats. c. 131, § 14 ("evidently unsuitable"); *Thayer v. Homer*, 11 Met. 104, 110 (hostile and conflicting in interest); *Clark v. Patterson*, 73 N. E. 806, 214 Ill. 533, 105 Am. St. Rep. 527 ("legally competent"); 62 A. 631, 102 Md. 379; 96 N. Y. S. 895 (pardoned for a crime); *Pike's Estate*, 45 Wis. 391. Cf. *Drake v. Green*, 10 Allen, 124; 1 Allen, 354. An interest conflicting with legatees does not make one incompetent at common law as executor. *Bauquier, Re*, 88 Cal. 303. See further, c. 3 as to administration; *McGregor v. McGregor*, 33 How. (N. Y.) Pr. 456.

<sup>3</sup> 1 Keyes, 133; 4 Redf. (N. Y.) 218. And see *Webb v. Dietrich*, 7 W. & S. 402; *Myrick Prob.* 117.

34. Numerous miscellaneous disabilities once existed in English law, which have since been taken off by Parliament, and at the present day find recognition neither in England nor the United States.<sup>1</sup>

35. An executor must necessarily derive his appointment from a testament; for if the will designates no one for that office, the court commits the trust to an administrator with the will annexed.<sup>2</sup> Executors doubtless may be substituted or added by a codicil where the original will made a primary appointment.<sup>3</sup>

36. The constructive appointment of an executor suffices: as where the testator indicates his desire that the essential functions of that office shall be discharged by a certain person; in which case one is said to become executor under the will according to the tenor.<sup>4</sup>

37. Where, however, the court cannot gather a testamentary intent that the person in question should collect dues, pay debts and legacies, and settle the estate like an executor, executorship according to the tenor will not be granted. For instance, it will not if A. B. is designated simply to perform some trust under the will; since trustees under a will are not necessarily executors, but are postponed in office to the latter and to a due administration of the estate.<sup>5</sup> A testamentary direction that one's property shall, upon his decease, go at once to the legatees or to trustees, as if to dispense with administration and the payment of debts altogether, or to confer the authority out of course, would be nugatory.<sup>6</sup>

<sup>1</sup> Not only were traitors and felons considered incapable of becoming executors by the civil and canon law, but heretics, apostates, manifest usurers, infamous libellers, incestuous bastards, and persons standing under sentence of excommunication. Swinb. pt. 5, §§ 2-6. Other disqualifications were created during the religious struggles of the 17th and 18th centuries, by legislation. See Wms. Exrs. 7th ed. 237, 238.

<sup>2</sup> 1 Wms. Exrs. 239; 3 Redf. Wills, 2d ed. 62.

<sup>3</sup> Swinb. pt. 1, § 5, pl. 5; 1 Wms. Exrs. 8. See 7 Lans. 121; Woods, Goods of, L. R. 1 P. & D. 556.

<sup>4</sup> Fraser's Goods, L. R. 2 P. & D. 183; 1 Wms. Exrs. 239; 1 Hagg. 80; Hartnett v. Wandell, 60 N. Y. 350, 19 Am. Rep. 194; 1 Houst. 569; 7 Watts, 51; Grant v. Spann, 34 Miss. 294; 10 B. Mon. 394; Fry's Goods, 1 Hagg. 80.

Such as the gift to A. B. of all one's property, to apply the same, "after payment of debts," to the payment of legacies. Bell's Goods, L. R. 4 P. D. 85; L. R. 1 P. & D. 556; Bradley's Goods, 8 P. D. 215. Or the naming of trustees "to carry out this will," for the due execution of this will "and to pay the debts" and the like. Russell's Goods, (1892) P. 380; Ib. 227. For all such expressions point at the essential functions of an executor; functions which exist in consistent combination.

<sup>5</sup> 2 Sw. & T. 155; 1 Wms. Exrs. 242; Punchard's Goods, L. R. 2 P. & D. 369; Wheatley v. Badger, 7 Penn. St. 459. But cf. 10 B. Mon. 394; 2 Bradf. Surr. 32; 2 Spears (S. C.) 97. See Knight v. Loomis, 30 Me. 204; Simpson v. Cook, 24 Minn. 180; West v. Bailey, 94 S. W. 273, 196 Mo. 517.

<sup>6</sup> 3 Sw. & Tr. 562; Drury v. Natick, 10 Allen, 174; 9 Met. 533; Hunter v. Bryson, 5 Gill & J. 483; 24 Am. Dec. 313. Here administration with the will annexed becomes

38. **There should be some means of identifying the person designated** by the will to serve as executor, else the designation cannot operate. But an executor who is imperfectly or erroneously described or designated in the will may, by extrinsic evidence, be identified as the person actually intended by the testator.<sup>1</sup>

39. **A testator will sometimes name another person besides** his actual executor to advise, oversee, or assist the latter in the performance of his duties; and such a person has, if so the testator obviously intended, none of the rights or responsibilities of executor, nor any right to intermeddle, but may advise, complaining to the court if his advice is injuriously neglected.<sup>2</sup>

40. **Conditional, provisional or substituted executors** should be respected according to the testator's manifest intent.<sup>3</sup> Where several executors are named or designated, all may be qualified as co-executors, though all are thus legally regarded as an individual, in place of a sole executor.<sup>4</sup> A testator may, however, appoint several executors under his will, substituting one after another in order, so that, if the first cannot act, the next may, and so on.<sup>5</sup> The appointment of executors under a will may be revoked by the substitution of others under a codicil,<sup>6</sup> or a re-appointment with others may be made instead;<sup>7</sup> and of various persons named as co-executors, he or they who may be alive and willing to accept the trust on the testator's decease can alone be deemed qualified for the office.<sup>8</sup>

proper. See *post*, 122-127. See further, 3 Phillim. 116; 1 Sw. & Tr. 525; Adamson's Goods, L. R. 3 P. & D. 253; 25 W. R. 305.

<sup>1</sup> De Rosaz, Goods of, 25 W. R. 352; Clayton v. Lord Nugent, 13 M. & W. 207; 2 Atk. 239; 29 W. R. 744; 2 Dem. (N. Y.) 91.

<sup>2</sup> 1 Wms. Exrs. 7th ed. 244; 3 Phillim. 118. But cf. Foster v. Elsley, L. R. 19 Ch. Div. 518; Ogier, *Rs*, 101 Cal. 381. Sometimes a co-executor is thus meant.

<sup>3</sup> 1 Wms. Exrs. 243-245; Grant v. Leslie, 3 Phillim. 116.

<sup>4</sup> 1 Wms. Exrs. 246.

<sup>5</sup> Here the question may arise, whether the substitution relates merely to a precedence once and for all at the time the will takes effect, or so as to provide for a successor whenever, prior to a final settlement of the estate, a vacancy may possibly occur in the office. Langford's Goods, L. R. 1 P. & D. 458; 2 Robert. 579; Lighton's Goods, 1 Hagg. 235; Kinney v. Keplinger, 172 Ill. 449, 50 N. E. 131.

<sup>6</sup> Bailey's Goods, L. R. 1 P. & D. 608.

<sup>7</sup> Leese's Goods, 2 Sw. & Tr. 442.

<sup>8</sup> An executor by the tenor may, if the will so intended, receive letters jointly with an executor expressly named. 1 Wms. Exrs. 245; 3 Phillim. 116. And a person expressly appointed executor for limited purposes may, by a codicil, receive by implication full general powers. Aird's Goods, 1 Hagg. 336. There may be one executor for general purposes, and another for some limited or special purpose, if such be the testator's manifest intention. Lynch v. Bellew, 3 Phillim. 424; 1 Wms. Exrs. 245.



41. The testator's right to delegate to some person or persons designated in the will the power to name an executor is upheld in England and sometimes in this country.<sup>1</sup>

42. A testator may impose conditions and limitations under the will at his own discretion; and the old books state numerous instances of the sort.<sup>2</sup> Such condition failing, whether precedent or subsequent, the appointment fails upon the usual principle of a conditional appointment. Again, there may be limitations placed by the testator upon the exercise of the office; as where one commits the execution of his will in different countries to different persons.<sup>3</sup> In short, there may be various qualifications imposed by one's will upon the executor or executors therein appointed. Various substitutes may be designated to serve upon one and another contingency, and in succession instead of jointly; executors, moreover, may be appointed having separate and distinct functions to discharge, some full and general, others limited and special, in authority.<sup>4</sup>

43. An executor cannot assign his executorship, the trust being pronounced in such connection a personal one;<sup>5</sup> nor can the executorship pass upon his death to his legally appointed executor or administrator.<sup>6</sup> If there were several executors, so that one at least still survives in the office, no interest is transmissible by the deceased executor.<sup>7</sup>

<sup>1</sup> See 1 Hagg. 548; 1 Wms. Exrs. 245-247; 2 Robert. 344; *Hartnett v. Wandell*, 60 N. Y. 346; 19 Am. Rep. 194; *State v. Rogers*, 1 Houst. (Del.) 569; *Wilson v. Curtis*, 151 Ind. 471, 68 Am. St. Rep. 237, 51 N. E. 913; 2 Sw. & Tr. 127; *Bishop v. Bishop*, 56 Conn. 208; *Hartnett v. Wandell*, 60 N. Y. 346, 19 Am. Rep. 194 (power to executor to name his associate).

<sup>2</sup> As in furnishing security. *Godolph. pt. 2, c. 2, § 1*; 1 Wms. Exrs. 7th ed. 253. See bonds, c. 5, *post*. See also *Cro. Eliz.* 219; 3 *Leon.* 2, pl. 6; 1 *Curt.* 1.

<sup>3</sup> *Hunter v. Bryson*, 5 Gill & J. 483; 25 Am. Dec. 313; *Mordecai v. Boylan*, 6 Jones Eq. 365; *Despard v. Churchill*, 53 N. Y. 192; 3 Sw. & Tr. 453, 456. There may be a postponement of the office, as some proviso by way of succession or the substitution of one executor or set of executors for another. 1 Hagg. 235; 40 *supra*. So, too, one may be appointed for a definite period of time, or during the minority of a son, or the widowhood of a wife, or until the death or marriage of a son, or the remarriage of a widow, or while the instituted executor is absent from the country. Wms. Exrs. 251; *Carte v. Carte*, 3 Atk. 180; *Cro. Eliz.* 164; 2 *Cas. t. Lee*, 371. Administration with will annexed may serve for an emergency, where the will itself does not supply.

<sup>4</sup> For while the estate of an administrator is only that which the law of his appointment enjoins, an executor's interest in the testator's estate is what the testator gives him. *Hill v. Tucker*, 13 How. (U. S.) 466, 14 L. Ed. 223. And see *Hartnett v. Wandell*, 60 N. Y. 346, 19 Am. Rep. 194. But where the authority of the executor is restricted, this should appear in the letters testamentary. 7 *Jur. N. S.* 195; *Gibbons v. Riley*, 7 Gill, 81.

<sup>5</sup> *Vaugh.* 182; 26 *W. R.* 535.

<sup>6</sup> 2 *Bl. Com.* 506.

<sup>7</sup> 1 Wms. Exrs. 256, 284. But see the English rule of executor to a sole executor. 1 Wms. Exrs. 7th ed. 254-256, and cases cited; 3 *Curt.* 31; (1896) *P.* 129; 2 *Robert.* 349; *Birkett v. Vandercom*, 3 Hagg. 750.

44. We next proceed to the executor's decision to take or not to take the trust. For every appointment to an office there must be two parties at least; and in the first instance no one is bound to undertake private responsibilities which another seeks to fasten upon him. The office of executor is a private trust, devolving upon one individual by another's selection, and not by act of the law; and hence the office may be accepted or refused at discretion.<sup>1</sup> The time of acceptance or refusal of an executorship is properly deferred to the date when the will comes into operation; that is to say, when the testator is dead, and the will ought to be admitted to probate and some one undertake the responsibility of settling the estate.<sup>2</sup>

45. The death of the sole executor named in the will, before having either taken or renounced probate, leaves a vacancy,

In the American States that rule, which so disregards the testator's kindred and their wishes, is now quite generally changed by statute; and in consequence, the duties and liabilities of the sole executor upon his decease devolve not upon the executor of the executor as such, but upon an administrator with the will annexed of the estate of the original testator, whose appointment is made by a court upon considerations favorable to those interested in such estate. See various local statutes; *Prescott v. Morse*, 64 Me. 422; *Scott v. Fox*, 14 Md. 388; 4 Mass. 634; *Wetzler v. Fitch*, 52 Cal. 638. In some States the old English rule seems to be still followed. *Lay v. Lay*, 10 S. C. 208; 1 Md. Ch. 296; 1 Ga. 322; 2 J. J. Marsh. 195; 20 Fla. 58. See 2 Dem. 327. See also, *Windsor v. Bell*, 61 Ga. 671; 3 Dev. L. 434; 1 Dev. & B. Eq. 199.

<sup>1</sup> *Lowry v. Fulton*, 9 Sim. 115; 1 Wms. Exrs. 274; *Thornton v. Winston*, 4 Leigh, 152, 62 S. E. 433, 148 N. C. 346.

<sup>2</sup> Presumptions treat a promise during testator's lifetime as inconclusive and without binding force. See 2 Sch. & Lef. 392; *Slaney v. Watney*, L. R. 2 Eq. 418 (legacy left). The right to "renounce" an executorship exists only before one receives letters testamentary. 3 Dem. (N. Y.) 164. See peculiar right to retract a renunciation under the New York code. *Ib.*

The executor's acceptance of his appointment is signified by proving the will in court and taking out letters testamentary. How all this should be done will presently appear. See next c. But so important is it, in the interests of an estate, that a dead person's will should be placed promptly upon record, if he has left one, and his estate committed for settlement, that from very early times the ordinary was empowered in England to summon any person before him who had been named executor under the will of the deceased, and by summary process compel him to prove or refuse the testament; punishing him for contempt if he refused to appear; an authority which has been transferred to the new courts of probate in that country, and is exercised generally by courts of similar jurisdiction in the United States. 1 Wms. Exrs. 274; *supra*, 11, 14. It is the policy of such statutes to require the person thus named to decide speedily whether he will accept or decline the trust; and in the latter event, or where he unreasonably neglects after due citation to appear, the court takes heed that the probate of the will is pursued, and thereupon commits the representation of the testator and the administration of his estate as though no such person had been named executor; or, if the will ought not to be admitted to probate, proceeds as in other cases of intestacy. By such procedure, co-executors, or executors in succession, may be passed over, and the associate or substitute may be qualified by the court; or, instead, an administrator with the will annexed, or a general administrator, as the state of facts and legal consistency may require.

whether the death occurred during his testator's life or later, which must be supplied as in case of a formal renunciation.<sup>1</sup>

46. **Probate procedure establishes the fact of an executor's refusal or acceptance** of his office, under modern statutes.<sup>2</sup> The fact, however, should be matter of judicial supervision, and hence of judicial record. A formal renunciation of the trust, signed by the executor named for it and filed of record, will commonly suffice for that purpose. Such a writing or some judgment of record, reciting why the formality was dispensed with, ought, in sound probate practice, to precede the granting of letters testamentary or administration to another.<sup>3</sup>

47. **On the whole, theories of constructive refusal or acceptance are hardly consistent with our modern probate practice.**<sup>4</sup> Under both English and American statutes, at the present day, summary proceedings are available in the court of probate jurisdiction to compel the person named as executor to prove the will and qualify, and in case of his unreasonable neglect to appear to commit the trust to others just as if he had formally declined.<sup>5</sup> And while, as a matter of general law, one who has proved the will, received letters testamentary, and fully qualified in court, cannot after-

<sup>1</sup> 2 Sw. & Tr. 15, 471.

<sup>2</sup> Statutes are sometimes quite explicit as to form. *E.g.*, Redf. Sur. Pr. 141. But in Massachusetts, and some other States, the instrument is more like a simple letter to the judge. See 16 S. & R. 416; 3 Sw. & Tr. 426, 490.

<sup>3</sup> *Long v. Symes*, 3 Hagg. 776; *Stebbins v. Lathrop*, 4 Pick. 33; 1 Wms. Exrs. 282. Neglect to qualify may be construed under favorable circumstances into a refusal to serve. 2 Murph. 85; *Uldrick v. Simpson*, 1 S. C. 283. If one intermeddles with the estate he ought to be treated as executor only so far as to be held responsible to all interested for his unauthorized or injudicious acts. Cf. old English rule, 1 Wms. Exrs. 277. See c. 8, *post*. An oath of non-intermeddling is required in renunciation in English practice. 3 Sw. & Tr. 465.

As to constructive refusal, see further, *Williams v. Cushing*, 34 Me. 370; 37 Me. 264. A judge of probate named as one of the executors under a will, shows, by acting as judge in admitting the will to probate and qualifying the co-executors, that he declines to serve. *Ayres v. Weed*, 16 Conn. 291. Refusal to act as executor may be implied without record evidence or express declaration. *Solomon v. Wixon*, 27 Conn. 291, 71 Am. Dec. 66; *Thornton v. Winston*, 4 Leigh, 152; *Ayres v. Clinefetter*, 20 Ill. 465; *Uldrick v. Simpson*, 1 S. C. 283.

<sup>4</sup> They may serve to establish presumptions where public records are lost, or to facilitate the course of justice in dealing with an intermeddler or an indifferent nominee, according as the interests of creditors and legatees may demand.

<sup>5</sup> Such proceedings render acceptance and refusal of an executorship matter of public record, and discourage legal inferences from acts and conduct of the nominee *in pais*. See 21 & 22 Vict. c. 95, § 16; 1 Wms. Exrs. 275. Responsible as an executor may be for his acts and negligence respecting the trust before he has been duly qualified, modern policy disinclines to force one to serve as executor against his will or regardless of the true welfare of the estate, provided there are others at hand competent and ready to assume the management. Such trusts, in the United States at least, being now compensated, the office of executor becomes far less burdensome than in old times or in England when one was selected to perform these pious duties as a last favor to his dying friend.

wards renounce the executorship of his own accord or divest himself of its duties,<sup>1</sup> our local statutes now provide that executors, as well as administrators, may afterwards resign or be removed from office, when in the discretion of the probate court it appears proper.<sup>2</sup>

48. To exercise corruptly or for sinister purposes this right to renounce is not permissible.<sup>3</sup>

49. Whether, where a power is given to executors, they may renounce probate, and, at the same time, exercise the power, unless the power was conferred upon them personally and without reference to the office of executor seems doubtful.<sup>4</sup>

50. One cannot retract his renunciation as executor after the issuance of letters to another. His election once made, is, for the time being, irrevocable.<sup>5</sup> But a fresh opportunity may often be afforded him to take the trust, should a vacancy in the office afterwards occur, especially if a new state of things arises.<sup>6</sup> In practice, an executor's retraction of his refusal has been treated with considerable indulgence, so long as no other grant of letters supervened.<sup>7</sup> And even supposing letters of administration to have issued, if this were upon some misapprehension or error deserving correction, or for some temporary purpose not inconsistent with

<sup>1</sup> 12 Mass. 358; 8 Ired. Eq. 253.

<sup>2</sup> *Thayer v. Homer*, 11 Met. 104; *Morgan v. Dodge*, 44 N. H. 258, 82 Am. Dec. 213; 10 Ark. 169; *Harrison v. Henderson*, 7 Heisk. 315. See c. 6, *post*. One's renunciation has been accepted in some instances after probate of the will but before qualification. *Miller v. Meetch*, 8 Penn. St. 417; *Davis v. Inscoe*, 84 N. C. 396. If a bond with sureties must be furnished under the local statute, the inconvenience of furnishing a bond such as the court requires may furnish good reason for renouncing at the last moment.

<sup>3</sup> *Staunton v. Parker*, 26 N. Y. Supr. 55. And see *Nelson v. Boynton*, 54 Ala. 368; *Ellicott v. Chamberlin*, 38 N. J. Eq. 604, 48 Am. Rep. 327.

<sup>4</sup> *Wms. Exrs.* 286, 287. But cf. *Sugden Powers*, 138, 6th ed.; *Keates v. Burton*, 14 Ves. 434, *per* Sir Wm. Grant. See *Clark v. Tainter*, 7 Cush. 567. *Seem*, the testator's intention in his will should here prevail.

<sup>5</sup> *Thornton's Goods*, Add. 273; 59 How. (N. Y.) Pr. 214; *Briggs v. Probate Court*, 50 A. 335, 23 R. I. 125 (not even upon an appeal). The old practice was more favorable to permitting those who had once refused to come in afterwards and act. *Wms. Exrs.* 284; 4 M. & Gr. 814.

<sup>6</sup> As where the co-executor named under the will qualified alone and was afterward removed for statute cause, or died. 1 *Robert*. 406; *Codding v. Newman*, 63 N. Y. 639; *Perry v. DeWolf*, 2 R. I. 103; *Maxwell, In re*, 3 N. J. Eq. 611; *Davis v. Inscoe*, 84 N. C. 396. And see *Wheelwright's Goods*, L. R. 3 P. D. 71. Or where the appointed person presently absconded. *Stiles's Goods*, (1898) P. 12. Administration with the will annexed having once been duly granted, in fact, there would be no further opportunity left to the renouncing party to qualify as executor; and yet, under the broad discretion of the court, where a new administrator upon an unadministered estate has to be appointed, a sole legatee may well be pronounced in such an exigency the best suitable for the trust, and be appointed to the vacancy accordingly as an administrator. 1 *Wms. Exrs.* 283. Cf. *Thornton v. Winston*, 4 Leigh, 152.

<sup>7</sup> 1 *Wms. Exrs.* 283; *McDonnell v. Prendergast*, 3 Hagg. 212, 216; 3 Add. 272; *Robertson v. McGloch*, 11 Paige, 640.

probate, and before the executor can be said to have refused the trust, this party may have the administration revoked or superseded and letters testamentary issued to him.<sup>1</sup>

51. **Where two or more are named co-executors under a will**, all must duly have renounced or have defaulted upon citation to the same result, before the will can be treated as in effect a will without an executor, so as to be properly committed to an administrator with the will annexed. The refusal of one co-executor does not exclude the others, nor prevent succession, substitution, or a sole execution of the trust, as the testator's wishes or the just interests of the estate may require.<sup>2</sup> One of the co-executors having renounced, letters will be granted to the remaining executor,<sup>3</sup> and, unless it appears to the court imprudent, to him alone.

52. **Executors are appointed, or rather designated, by the testator's will**; but the full appointment, according to modern English and American practice, comes from the court of probate jurisdiction, which, recognizing and confirming the testator's selection, clothes the executor therein named with plenary authority by issuing letters testamentary to him upon his qualification<sup>4</sup>

<sup>1</sup> As e.g. where a will turns up after a grant of administration. *Taylor v. Tibbatts*, 13 B. Mon. 177; 2 Wms. Exrs. 283. See *Casey v. Gardiner*, 4 Bradf. 13. Cf. as to administrators having precedence, *post*, 112.

<sup>2</sup> *Judson v. Gibbons*, 5 Wend. 224. And see *Jewett v. Turner*, 52 N. E. 1082, 172 Mass. 497 (mere delay in qualifying); *Briggs v. Probate Court*, 50 A. 335, 23 R. I. 125; 1 Robert. 406; 1 Wms. 285.

<sup>3</sup> *Miller v. Meetch*, 8 Penn. St. 417. An executor who renounces, being a creditor of the estate, is not debarred of the usual remedies of creditor. *Rawlinson v. Shaw*, 3 T. R. 557.

<sup>4</sup> Letters testamentary are granted usually in connection with decreeing the probate of the will; and, as our next chapter will show, one's last testament should be presented for probate, whether the executor named be willing to serve and competent for the trust or the reverse. A will is not necessarily executed by an executor, nor dependent for enforcement of its provisions upon any survivor of the deceased. Hence, according to our present probate procedure, an executor derives his office (1) from a testamentary appointment, which (2) is confirmed by a decree of the probate court, and the issue of letters testamentary to him accordingly.

## CHAPTER II.

## PROBATE OF THE WILL.

53. **The duty of producing the will and having it admitted to probate is paramount.** And so fundamental to jurisdiction upon the estate of a deceased person is it to ascertain whether such person has died testate or intestate, and if testate, what was his last will and testament, what instrument, in truth, made and subscribed by him with due formalities while capable and free to exercise the momentous power of testamentary disposition, embodied his latest wishes—so important is it to know whether he has chosen in fact to have his property settled and distributed according to his own scheme, or to let the law of intestacy operate—that the personal claim of this or that individual to execute or administer the estate is but secondary in importance.<sup>1</sup>

54. **Local statutes quite generally affix criminal penalties to the intentional suppression, secretion, or destruction of a dead person's will by any one acquiring possession thereof.** They provide also for summary proceedings in the probate court against any person having or suspected of having, or knowing as to the whereabouts of such an instrument.<sup>2</sup>

<sup>1</sup> Hence the will, whoever may be its temporary custodian, should be properly produced in court after the testator's death, in order that its validity may be finally determined, and incidentally the rights of all persons claiming a title and interest in the decedent's estate. The executor named in the instrument is the most suitable person for such temporary custody and formal production. But wills are sometimes received, under appropriate statutes, from such as may have chosen during lifetime to deposit the same confidentially in the probate registry; or the instrument is committed to the care of an attorney, or some confidential friend; or it is lodged among one's effects or business papers, so that some member of the family, a partner, or a business clerk, may happen first to light upon it; or perchance it may have been carelessly or artfully placed where only accident is likely to discover it, and the finder may prove an utter stranger. In any and all of these situations, and under whatever other circumstances the will, or what purports to be the will, of a party deceased may be found, the custodian, come he casually or purposely into possession, is bound to produce and surrender it in such a manner that, in all reasonable expectation, it shall duly and speedily be brought before the proper tribunal having probate jurisdiction of the estate. Most mere custodians may well surrender the paper to the executor named therein; but the duty does not cease here; and by giving the fact that the instrument has been found due publicity, one should procure what the policy of the law now requires, its production for probate before the proper tribunal.

An attorney or solicitor, the custodian of a will, cannot refuse its surrender for probate upon any claim of a lien for unpaid fees. *Balch v. Symes*, Turn. & Russ. 87.

<sup>2</sup> *Stebbins v. Lathrop*, 4 Pick. 33; 69 A. 135, 80 Vt. 510. Independently of such legislation, according to correct reasoning, every court of competent probate jurisdiction has a lawful authority, inferable from its peculiar functions, to summon parties and conduct an inquiry with a view to compelling production of the instrument. *Cas. temp. Lee*, 158; *Swinb. pt. 6*, c. 12, pl. 2; 15 Abb. Pr. 12. Cf. local statutes.

55. **The moment one dies, the instrument or instruments, if any, which he has left duly executed and unrevoked, constitute his last will and testament, with conclusive force and operation as such; and to prove and establish what purports to be such last will and testament, so that it may fully operate, or, more generally, to ascertain whether, in a legal sense, any last will and testament was left at all, becomes, in the first instance, the peculiar province of the local court of his last domicile; and, besides, to fully appoint and qualify the person or persons who, according as he died testate or intestate, may be entitled to manage and settle the estate and represent the deceased.**<sup>1</sup>

56. **The time after the testator's death when his will should be presented for probate must depend somewhat upon sound discretion; distance, the facility of procuring witnesses and needful testimony, and the convenience of the executor and parties interested, being circumstances of no little consequence in this connection. Decency requires delay until after the burial has taken place; but, as a rule, the will of a deceased person should be produced for public custody as soon after the funeral as possible; whether this be in open court, or by first filing the instrument with the register, in order that citation may issue for probate later at some convenient court day, as in conformity with local practice.**<sup>2</sup>

<sup>1</sup> We have seen that one's will may be received for deposit under suitable English and American statutes, at the registry of wills, while he is alive. *Supra*, 53; 2 Wms. Exrs. 319. Such statutes, of course, only provide a convenient place of deposit. The testator, having the right to revoke, may withdraw the will, whenever he desires, from such custody, during his lifetime. The earlier English books, however, make mention of precautionary proceedings which a living testator might invoke on his own petition; the effect of which was to have the will duly recorded and registered among other wills. But proof so adduced had not the effect of probate, so as to preclude revocation. Swinb. p. 6, § 13, pl. 1. And see *Lloyd v. Chambers*, 56 Mich. 236, 56 Am. Rep. 378, 23 N. W. 28 (no *ante mortem* probate).

<sup>2</sup> Delaying production of the instrument is one thing, and delaying proof of its authenticity and the issuing of letters another. English and American statutes accord in affording reasonable time and opportunity to all interested in this latter respect, while, as to the former, discouraging every species of delinquency. 1 Wms. Exrs. 320; local American statutes.

But, however late, from one cause or another, probate may have been delayed, the better practice, in the absence of a positive statute of limitations, is to admit the will on due proof, at any time, to probate; though suspicion may thus arise and the authenticity of ancient instruments, whose establishment would tend to disturb estates long settled in good faith, ought only to be admitted upon the clearest testimony. In the absence of positive statute there is no definite limit to the time within which a will may be probated. See as to local rules, 1 Pick. 114, 11 Am. Dec. 153; *Waters v. Stickney*, 12 Allen, 12, 90 Am. Dec. 122 (over 20 years); *Van Giesen v. Bridgford*, 18 Hun (N. Y.) 73; 143 N. C. 345, 55 S. E. 784 (50 years); 111 N. Y. S. 491, 631 (30 years); *Hanley v. Kraftezyk*, 96 N. W. 820, 119 Wis. 352 (real estate); *Ryan v. Texas Pacific R.*, 64 Tex. 239; 1 Jarm. Wills, 218; 40 N. J. Eq. 3; *Rebhan v. Mueller*, 114 Ill. 343, 55 Am. Rep. 869, 2 N. E. 75. Nor, apparently, does an action

57. **Jurisdiction over the probate of wills, as over the settlement generally of estates** of those dying testate or intestate, is determined primarily by the last domicile of the person deceased.<sup>1</sup>

58. **In general, the necessity of a probate is fully sustained by modern practice** in England and this country. The production of what purports to be a will can be of no legal force in the courts, however ancient the document, without this public record and seal of authenticity.<sup>2</sup>

59. **The requirement of probate now applies to all wills** whether of real or personal property or both.<sup>3</sup>

lie against one for neglect to probate the will; the proper remedy for parties in interest being to cite the executor or custodian in the court of probate. *Stephens, R.*, (1898) 1 Ch. 182.

<sup>1</sup> *Supra*, 15, 21. The local probate county or district is here regarded both in England and our American States. 58 S. E. 652, 129 Ga. 67. A probate jurisdiction, rightfully taken in the proper county or district, has full domestic operation in the State or country of the testator's last domicile, and gives to the executor or administrator a corresponding authority to be rightfully exercised. And if foreign letters and authority be needful for facilitating a settlement of the estate, where suit must be brought abroad, or part of the property is there situated, the usual course is to probate the will, if there be one, and procure letters testamentary within the proper domestic jurisdiction. The filing of a copy of the probate of such will, or its duly attested record, serves, in the foreign probate registry—with, perhaps, security given or ancillary letters procured besides in the foreign jurisdiction—the purpose needful, according as the foreign statute in question may prescribe. *Hood v. Lord Barrington*, L. R. 6 Eq. 218; *Carpenter v. Denoon*, 29 Ohio St. 379; *Campbell v. Sheldon*, 13 Pick. 8; *Ives v. Allyn*, 12 Vt. 589; *Bromley v. Miller*, 2 Thomp. & C. (N. Y.) 575; *Porter v. Trall*, 30 N. J. Eq. 106; 74 N. E. 815, 216 Ill. 166; 98 S. W. 492, 200 Mo. 492; *Williams, R.*, 1 Lea, 529; 63 A. 38, 73 N. H. 495 (need not probate first in domestic jurisdiction); *Stark v. Parker*, 56 N. H. 481; *Converse v. Starr*, 23 Ohio St. 491; *Russell v. Hartt*, 81 N. Y. 19. And see local statutes; *post*, c. 7.

<sup>2</sup> Neither the temporal courts in England, nor the courts of law and equity in the United States, will take cognizance of the testamentary papers, or of the rights dependent on them, until after their proper probate. 4 T. R. 258; *Strong v. Perkins*, 3 N. H. 517; *Wood v. Mathews*, 53 Ala. 1; *Pitts v. Melser*, 72 Ind. 469; *Willamette Falls Co. v. Gordon*, 6 Oreg. 175. But cf. local rule in *Arrington v. McLemore*, 33 Ark. 759. See also *Richards v. Pierce*, 44 Mich. 444, 7 N. W. 54. Probate, however, having been duly procured, the probate is said to relate back to the time of the testator's death. 1 Wms. Exrs. 293; 9 Co. 38 a; 28 Beav. 366; *Hood v. Lord Barrington*, L. R. 6 Eq. 218, 224.

The allowance of a will in probate and the granting of letters testamentary are different judicial acts, though embraced under one petition. *Gurdy, R.*, 63 A. 322, 101 Me. 73.

<sup>3</sup> Cardinal distinctions, which the English chancery once asserted somewhat jealously against the ecclesiastical courts in times past, with the intent of confining the spiritual jurisdiction as closely as possible to goods and chattels, is materially done away with in England under the Court of Probate Act of 1857, which seeks to end forever the mischief of double trials of proof of the same will where title to real estate is involved. 1 Wms. Exrs. 341, 388-391; Act 20 & 21 Vict. c. 77, § 64 (1857). See 1 Atk. 628; 6 Ves. 134, 802; 7 Ves. 292. In most parts of the United States discrimination between wills of real and of personal property is abolished, and by appropriate statute it is provided that no will, whether of real or personal estate, shall be effectual to pass the same, unless it has been duly proved and allowed in the probate court, and the probate of a will devising real estate shall be conclusive as to its due execution in like manner as of a will of personal estate. *Shumway v. Holbrook*, 1 Pick. 114, 11 Am. Dec.



60. All codicils ought to be presented for probate, together with the original will; and this even though a particular codicil contains no disposition of property, but simply revokes all former wills.<sup>1</sup> Indeed, every testamentary paper should be presented at whatever time discovered, whether before or after a regular probate, and whether it merely confirms the will already proved, or, on the other hand, wholly or partially revokes it.<sup>2</sup>

61. For closed or secret testaments the civil law appears to have provided a special form of probate; but with us no testamentary disposition can be valid and at the same time secret in the sense of evading successfully the scrutiny of a probate court or a public registration after the testator's death, for the convenience of all parties interested.<sup>3</sup>

62. Instruments which do not purport to be testamentary are usually excluded from probate.<sup>4</sup>

153; *Wilkinson v. Leland*, 2 Pet. 655; *Bailey v. Bailey*, 8 Ohio, 245. But cf. *Fuentes v. Gaines*, 1 Woods, 112; *Davis v. Davis*, 6 Lea, 543; *Hegarty's Appeal*, 75 Penn. St. 503; Book 1, Part III.

<sup>1</sup> *Brenchley v. Still*, 2 Robert. 162; *Laughton v. Atkins*, 1 Pick. 535.

<sup>2</sup> *Weddall v. Nixon*, 17 Beav. 160; *Harrison v. Every*, 34 L. T. 238. Of two or more conflicting testaments it may be needful to determine which one remains in force by way of later revocation, or whether different papers deserve probate as together containing the last will of the deceased. See *Hughes v. Turner*, 4 Hagg. 30; *Morgan, Goods of*, L. R. 1 P. & D. 323. And a will may be properly admitted to probate even though it takes effect in certain provisions only, and is void as to others. *George v. George*, 47 N. H. 27; *Bent's Appeal*, 35 Conn. 523; 38 Conn. 26. Cf. Book I, Part III, c. 1, *passim*.

A testator who changes his will from time to time during his life, while in full mental vigor, would do well to guard against multiplying documents for presentation to probate. It is generally a good rule to make a new instrument, complete in its provisions, and destroy all previous ones.

<sup>3</sup> *Swinb.* pt. 16, § 14, pl. 1; *Godolph.* pt. 1, c. 20, § 4; 2 *Cas. temp. Lee*, 46. But wholly extraneous documents may be referred to in a will by way of regulating details in the manner of disposition. Thus, sole probate may be made of a will which directs a settlement of the estate after the manner of some will probated in a different jurisdiction, or according to the trusts in a certain deed which those entitled to possession refuse to give up or have copied. *Sibthorp's Goods*, L. R. 1 P. & D. 106. Where another such will or document is referred to, it is fair, wherever practicable, to have an authenticated copy thereof filed in the registry, without incorporating it in the probate. *Astor's Goods*, L. R. 1 P. & D. 150. Here there were found an English will and codicils, designed for English property, and an American will with nine codicils for disposing of property in America. (1896) P. 65. See Book I, 281. And see also as to a bulky catalogue made part of a bequest, *Balme's Goods*, (1897) P. 261. But a wholly extraneous writing referred to in a will need not usually be recorded or probated with the will itself.

<sup>4</sup> *Minot v. Parker*, 75 N. E. 149, 189 Mass. 176. But see *Smith v. Attersoll*, 1 Russ. 266; *Inchiquin v. French*, 1 Cox, 1; *Torre v. Castle*, 1 Curt. 303; s. c. on appeal, 2 Moore, P. C. 133; 1 Wms. Exrs. 109, 110. If a testator refers in his duly executed and attested will to another accessible paper which has already been written out, clearly and distinctly identifying and describing it, so that it may safely and practically be incorporated in so solemn a disposition, that paper is in many instances to be probated as part of the will itself. But even a contemporaneous writing, having the character of a mere letter of instructions to one's executors, and not being executed

63. Former laxity as to papers of a testamentary character<sup>1</sup> is now corrected by local statutes which require a proper attestation.<sup>2</sup>

64. The duty of propounding the will for probate devolves naturally upon the person or persons designated to execute its provisions. Nor ordinarily can the designated executor relieve himself of this duty except by filing his renunciation in due form as of probate record, and discharging himself of custody in a prudent manner.<sup>3</sup>

and attested as the law requires, can have no testamentary obligation, and should not be admitted to probate; and, in general, any extraneous unattested writing, to be incorporated with the will itself, should be reasonably identified by reference as part of it and as existing when the will was executed. See Book I, 281, 282, and cases cited.

<sup>1</sup> See 1 Wms. Exrs. 104, 105, and numerous cases cited; 30 Penn. St. 225; Book I, Part III, c. 1, *supra*. That the modern rule is even more dangerously lax with respect to establishing gifts *causa mortis* of incorporeal personalty, see 2 Schoul. Pers. Prop. 182.

<sup>2</sup> In both England and the United States, it must be considered the rule of the present day, by a great preponderance of authorities, that the form of a will is by no means essential to its testamentary character; for if the writing or writings duly witnessed, establish an intent to operate a disposal, in whole or in part, of one's estate upon the event of his decease, a probate is proper. 1 Wms. Exrs. 104-107; Book I, Part III, c. 1, *supra*. Hence the inference, likewise supported by abundant citations, that even though one may have intended to dispose by some instrument of a different sort, and not by a will, yet his disposition being incapable of taking effect in the one shape, it might take effect in the other; for, as the person had, if not the mind to make a will, the mind, nevertheless, to dispose in such a manner as wills operate, his intention may well be executed. Book I, 265-274.

Under the statutes, however, which insist explicitly upon a formal method of execution,—as (in some codes) by acknowledging in the presence of three or more witnesses, such as are rarely found attesting instruments of other kinds,—much of this refinement upon the *animus testandi* is dispensed with, and the law of wills becomes restored to its legitimate footing. Orders, bills of exchange, and papers hastily drawn up may even thus demand judicial recognition as wills; but the solemnity of an execution with attestation affords a reasonable assurance that the deceased intended thereby a testamentary act with its attendant consequences to his estate after death. The witnesses become sponsors to the probate court when the maker's own lips are silent. See Book I, Part III, c. 3, *passim*.

<sup>3</sup> But the executor might be absent or incapacitated, when the death emergency, so often unforeseen, arose, or he might be in culpable default. Probate, and more especially the production of the document for probate custody, is transcendent to all such mischances, and the public necessity of clearing titles and placing the dead person's estate in due course of settlement for the benefit of creditors and all others interested, paramount to the right of any particular person to execute the trust. When the person entitled renounces or fails to qualify, the court has recourse to other appointments; and so, too, in case of protracted contest or inevitable delay from one cause or another. See c. 4, *post*. But the will itself must be produced before the court or register, whoever may be its custodian; and the death having conferred a probate jurisdiction, any person interested, or who believes himself interested in the estate of the deceased, may petition for citation to have the will brought into the court. Of a custodian's excuses for delay or non-production under such circumstances the court shall judge. Godolph. pt. 1, c. 20, § 2; 3 Redf. Wills, 2d ed. 45; 1 Wms. Exrs. 318-320; *Foster v. Foster*, 7 Paige, 48; *Schober v. Probate Judge*, 49 Mich. 323, 13 N. W. 580. And see local codes; 107 Iowa, 384.

Hence, whenever the executors decline to offer an instrument for probate, any one claiming an interest under it, and not a mere intruder, may present it in his stead. *Ford v. Ford*, 7 Humph. 92; *Enloe v. Sherrill*, 6 Ired. 212; *Stone v. Huxford*, 8 Blackf.

65. Probate law recognizes two modes of proving a will: (1) in common form; (2) in solemn form, or, as it is said, *per testes*, or by form of law. The essential distinction consists in a careful establishment of the validity of the will by proof under the latter method, but not under the former; though the line is not drawn with uniform exactness as respects English and American practice on this point, and the citation or non-citation of interested parties is sometimes made the chief point of distinction.

66. (1) As to the first method, probate in common form applies only for convenience, expedition, and the saving of expense where there is apparently no question among parties interested in the estate that the paper propounded is the genuine last will, and as such entitled to probate. For contentious business before the court, probate in common form would be quite unsuitable.<sup>1</sup>

67. The probate of wills in common form is permitted in several American States, and, as in England, upon a reasonable assump-

452; 97 P. 23, 154 Cal. 91 (a creditor). Usually, however, the petition for probate embraces that for the appointment of executor or administrator with the will annexed, and is presented by the party claiming the office; and under the simple probate practice of our American county courts, the petitioner sets forth, in a printed blank, the facts of death and last domicile of the deceased, the names and places of residence of the surviving widow or husband and next of kin, and, alleging that the paper or papers presented constitute the last will and testament of the deceased, prays his appointment, making due reference to the foundation of his claim for the office, and his willingness to qualify according to law. See local codes. The testamentary capacity of the testator need not be alleged in the petition for probate. *Hathaway's Appeal*, 46 Mich. 328, 9 N. W. 435.

<sup>1</sup> 1 Wms. Exrs. 325; Swinb. pt. 16, § 14, pl. 1. According to the English ecclesiastical practice, in which such probate originated, a will is proved in common form, as the books state, when the executor presents it before the judge, and in the absence of, and without citing, the parties interested, produces more or less proof that the testament exhibited is the true, whole, and last testament of the deceased; whereupon the judge passes the instrument to probate and issues letters testamentary under the official seal. *Ib.* An important feature of this practice, from the earliest times, has been the oath of the executor who propounds the will for probate as to all the essential facts; and upon this oath so great reliance has always been laid in England, that by means of it a will purporting to be duly attested by witnesses, undisputed and apparently regular upon its face, becomes readily probated. And the Court of Probate Act of 1857 (20 & 21 Vict. c. 77), treats the disposition of all such non-contentious business as so purely formal that probate or letters of administration may in common form be procured from the registrar; direct application to the court being nevertheless permitted, as parties may prefer. Where there is no contention, nor reason for contention, English practice leaves the executor to his own choice as between taking probate of the will in common or in solemn form. And it is observable of English probate in common form, not only that the mode of proof is thus made to subserve the executor's convenience as far as possible, but that no notice need be given to persons interested in the will, nor opportunity afforded them to object to the proof. Wms. Exrs. 7th ed. 320-332, citing sections of the above statute, together with rules and orders of court. See 1 Hagg. 698; 2 Add. 16. Where minors are parties interested, see Gibbs, Goods of, 1 Hagg. 376. And as to issue born after probate, see 1 Hagg. 642. See further, Ayling's Goods, 1 Curt. 913; *Palmer v. Dent*, 2 Robert. 284; 1 Wms. Exrs. 332.

tion that the instrument presented is valid in all respects, and its proof not contested by any of the parties interested.<sup>1</sup>

68. **Aside from such distinction a local statute sometimes provides** that, when it appears to the court, by the written consent of the heirs-at-law, or other satisfactory evidence, that no person interested in the estate intends to object to the probate of the will, the court may grant probate thereof upon the testimony of one only of the subscribing witnesses.<sup>2</sup>

69. (2) **As to probate in solemn form**, this is the only kind suitable where the validity of the will is disputed; and the only kind which necessarily brings in all interested in the estate as parties to the probate proceedings, so as to be bound by the final decree.<sup>3</sup>

<sup>1</sup> Thus it is or has been recognized in New Hampshire, Virginia, North Carolina, South Carolina, Mississippi, Georgia, Missouri, Tennessee, etc. *George v. George*, 47 N. H. 44 (statute); 4 N. H. 406; *Teckenbrock v. McLaughlin*, 108 S. W. 46, 209 Mo. 533; *Hooks v. Brown*, 53 S. E. 583, 125 Ga. 122; 119 Tenn. 638, 14 L. R. A. (N. S.) 991, 105 S. W. 858; *Armstrong v. Baker*, 9 Ired. 109; *Kinard v. Riddlehoover*, 3 Rich. 258; *Jones v. Moseley*, 40 Miss. 261, 90 Am. Dec. 327; 56 Miss. 204. And see as to New Jersey, 52 N. J. Eq. 319, 30 A. 19; 55 A. 75, 65 N. J. Eq. 329. American law commonly demanding attestation by witnesses, the judge approves in common form upon the testimony of one of the subscribing witnesses alone, without requiring the other witnesses to attend; though approval is given apparently upon *ex parte* proceedings, as in England, so as to dispense with a citation to persons interested in the estate. The executor's oath is less relied upon.

The intent of such probate in common form, granted *ex parte*, appears to be, that in case contest (within a prescribed limit of time) shall hereafter arise, solemn proof shall be required and the former decree may be set aside accordingly, but otherwise such probate becomes conclusive. *Tucker v. Whitehead*, 58 Miss. 762; 45 S. E. 504, 118 Ga. 436. If a petition is for probate in common form and without notice to the heirs, and if upon the hearing counsel appear for the heirs and cross-examine the witnesses to the will, this does not waive the probating in solemn form. *Gray v. Gray*, 60 N. H. 28.

<sup>2</sup> Mass. Gen. Stats. c. 92, § 19; *Dean v. Dean*, 27 Vt. 746; 2 Humph. 178 (as to a will of personal property). Probate under such a statute is not rendered *ex parte*, or with the inconclusiveness of a strict probate in common form, but stands to all intent as a probate in solemn form, because all the interested parties must have been brought within the scope of a judicial investigation, and their respective rights fairly protected. For, as we must bear in mind, the essential facts which entitle a paper legally to probate do not differ, whether the probate is contested or not contested.

<sup>3</sup> The English probate court has established rules for contentious business of this description which comes before a judge and not a register. Thus, an executor may be compelled by a party in interest to prove a will in solemn instead of common form; and so, too, after he has propounded and proved the will in common form, he may be put to the proof over again, *per testes*, in solemn form. 2 Wms. Exrs. 334; *Godolph. pt. 1, c. 20 § 4*. One who lets a long time elapse before requiring such probate can claim no indulgence of the court, and nothing beyond his legal rights. 1 Add. 375; *Blake v. Knight*, 3 Curt. 553. But where no statute fixes the barrier, it is after all uncertain whether any specific time can be set for limiting such compulsion. 2 Phillim. 231, note. And see, 2 Sw. & Tr. 448; *Core v. Spenser*, 1 Add. 374; 1 Wms. Exrs. 336, 337; 2 Cas. temp. Lee, 241. As to requirement by a creditor, see 1 Cas. temp. Lee, 544; 2 Curt. 845; 1 Wms. Exrs. 338.

Finally, in English practice, the executor may himself propound the will in solemn form upon due citation, in the exercise of a rightful discretion. And manifestly, wherever the executor is not of kin and sole legatee, but other large pecuniary inter-

70. Our American practice being simple and inexpensive by comparison, less occasion is found than in England for duplicating probates; and in most States one probate practically concludes all issues. This probate deserves the style of solemn form (though seldom designated as such), and borrows certain features, including the citation, from the English probate practice.<sup>1</sup> One rule applying in general, whether the will relate to real or personal estate, or to both, the citation which issues from the register's office, upon the filing of the will accompanied by one's petition for letters testamentary or of administration, embraces in terms heirs-at-law, next of kin, and all other persons interested in the estate of the deceased.<sup>2</sup>

ests are at stake, this must be his only prudent course; unless it is certain that the will is neither objectionable in itself nor likely to be objected to. 1 Wms. Exrs. 335-341. As to citation, see 2 Sw. & Tr. 486; 1 Sw. & Tr. 279; Act 20 & 21 Vict. c. 77, §§ 61, 63.

<sup>1</sup> O'Dell v. Rogers, 44 Wis. 136; Parker v. Parker, 11 Cush. 519. In some parts of the United States personal service or summons is insisted upon. Cobb's Estate, 49 Cal. 600. Legatees and devisees made indispensable parties. Reformed Presb. Church v. Nelson, 35 Ohio St. 638. But cf. 2 Demarest, 160; 9 Lea, 57.

The next of kin has an interest entitling him to contest the probate of an alleged will; so, also, one who by the probate would be deprived of rights under a former will. 5 Redf. (N. Y.) 220, 326. And see 49 S. E. 668, 103 Va. 540. As to minor, see Mousseau's Will, 30 Minn. 202. Newspaper publication, with or without mailing copies, or personal service upon all parties interested, is permitted at discretion by many local statutes; but the former course is the more convenient. See Cobb's Estate, 49 Cal. 600. Local statutes should be consulted on such points of practice.

<sup>2</sup> These are summoned to appear in court at a day named, and show cause, if any they have, why the will should not be allowed and the petition granted. Once a week, for three successive weeks, is the rule of publication in many States; though the form and terms of notice are largely in the discretion of the judge. Formal notice is dispensed with when the heirs-at-law, next of kin, and all others interested in the estate of the deceased express in writing their waiver of notice in favor of the petition, being all *sui juris*; otherwise, the petitioner, having served the citation in accordance with the terms prescribed, makes his return of the fact under oath, on or before the day fixed for the hearing. The judicial hearing, whether upon contest or not, concludes the validity of the will; subject, of course, to vacating probate on appeal, the submission of issues of fact to a jury, impeachment by direct proceeding, and other rights, such as local statutes and practice may secure. The decision of the county judge of probate is that of the lower tribunal of competent original jurisdiction, and concludes, while undisturbed, the common-law courts. Brown v. Anderson, 13 Geo. 171; Noyes v. Barber, 4 N. H. 409. And see Townsend v. Townsend, 60 Mo. 246; Parker v. Parker, 11 Cush. 524; 6 Met. 367. And the only distinction worthy here of regard is, that while at the probate hearing the propounder of a will, who anticipates a contest, must be prepared to prove his case (subject to any adjournment of the case for good reasons), probate where no contention arises may be granted on the favorable testimony of a single subscribing witness, as the statutes of some States wisely provide. 68, *supra*. Cf. Allison v. Allison, 46 Ill. 61, 92 Am. Dec. 237; 22 Hun, 43; 77 N. E. 906, 221 Ill. 458.

There are States, however, in which the probate in solemn form is distinguished, as in England, from that in common form, and where the due citation of all persons in interest to witness proceedings and the production of the will in open court, for proof upon testimony which they may fully controvert, becomes appropriate to contentious cases, or else calls for an executor's discretion. *Supra*, 67; 55 A. 75, 65 N. J. Eq. 329. In such States, the law sometimes limits the period within which a probate in common form may rightfully be contested. Parker v. Brown, 6 Gratt. 554; Roy

71. Contest may arise over the probate of conflicting testamentary papers, each of which has been propounded as the instrument truly entitled to probate. Here the object being to ascertain which, if either or any of them, embodies in testamentary form the last wishes of the deceased, proof of the instrument of latest date comes first in order.<sup>1</sup>

72. The parties in interest in the estate may agree to carry out provisions of a certain will or codicil, which, for want of due execution or other cause, must be pronounced invalid. To such agreements, all who may be lawfully entitled to share in the estate and its benefits (creditors not included) should be made voluntary parties.<sup>2</sup>

73. The party who propounds a will for probate should be prepared to prove affirmatively three things, as conformity with the statutes, English or American, at the present day usually demands: (1) that the will was in writing duly signed by the testator, or under his express direction; (2) that the will was attested and subscribed in presence of the testator by the requisite number of competent witnesses; (3) that the testator at the time when such execution took place was of sound and disposing mind.<sup>3</sup>

v. Segrist, 19 Ala. 810; Martin v. Perkins, 56 Miss. 204; 63 A. 38, 73 N. H. 495 (one year); 59 S. E. 687, 146 N. C. 254 (seven years). And in various States, as in English practice, an interested party may file a caveat against the probate of a will he means to contest. 47 N. J. Eq. 585; 62 Md. 342.

<sup>1</sup> Lister v. Smith, 3 Sw. & Tr. 53. A similar rule applies where the validity of particular codicils is in dispute.

<sup>2</sup> Such transactions, in fact, stand upon the footing of general dispositions by the rightful owners of property, and cannot operate to entitle to probate what was not, in the legal sense, a will. But where a pending contest has been adjusted out of court, by all the parties interested, and opposition is withdrawn to the particular will propounded, such will may be passed to probate on *prima facie* evidence of its validity, leaving private arrangements concerning the distribution of the estate for the parties to prove and enforce in other courts, or carry out amicably among themselves. See Greeley's Will, 15 Abb. Pr. N. S. 393; Doran v. Mullen, 78 Ill. 342. As to withdrawing a will presented, see Heermans v. Hill, 4 Thomp. & C. 602; 15 Abb. Pr. N. S. 393. Compromises are permitted by some local statutes, in litigation over the probate. Bartlett v. Slater, 65 N. E. 73, 182 Mass. 208.

<sup>3</sup> In the foregoing respects, and in general, to show that the instrument propounded was the testator's last will and testament, the burden of proof rests upon the party who offers the instrument for probate; and what is here said of a will applies also to each codicil which may be offered with it. Book I, Part II, c. 9; ib. Part III, *passim*; 2 Wms. Exrs. 20, 342; Sutton v. Sadler, 3 C. B. N. S. 87; Robinson v. Adams, 62 Me. 369, 16 Am. Rep. 473; Crowninshield v. Crowninshield, 2 Gray, 524; Taff v. Hosmer, 14 Mich. 309; Delafield v. Parish, 25 N. Y. 9; 8 Conn. 254, 20 Am. Dec. 100; Evans v. Arnold, 52 Ga. 169; Gerrish v. Nason, 22 Me. 438, 39 Am. Dec. 598; Lockwood, *Re*, 69 A. 8, 80 Conn. 513. And inasmuch as the burden of proof rests thus upon the proponent, as to due execution and the alleged testator's competency, he is entitled to open and close the case where a jury is empanelled. Robinson v. Adams, 62 Me. 369; Taff v. Hosmer, 14 Mich. 309.

But the usual rules of evidence apply to such judicial hearings. The proponent is aided by legal presumptions, and the burden of proof may shift from one side to the

74. **As to proof of the will, its due execution should be shown.<sup>1</sup>**

75. **All proof of a will must consist with a full comprehension of its contents and an intelligent execution; but the testator's condition and surrounding circumstances should always be considered.<sup>2</sup>**

76. **Proof of the will by witnesses is requisite, and such witnesses should be "credible" or "competent" under the local code, and of sufficient number.<sup>3</sup>**

77. **Consistent and intelligent execution, taken as a whole, and a fair connection between witnesses and testator in the legal formalities, should appear under all circumstances.<sup>4</sup>**

78. **A perfect attestation clause must aid greatly in establishing the regularity of a will, for this affords plain written evidence of a testamentary execution, and freshens the memory on points readily forgotten.<sup>5</sup>**

79. **Besides proof of a genuine execution such as the statute may have directed, on the part of both testator and his witnesses, the proponent of the will must be prepared to show affirmatively that the testator, at the time of such execution, was in a suitable testamentary condition.<sup>6</sup>**

other in the course of a hearing. The proponent seldom has to go beyond formal proof by the subscribing witnesses (who, from their peculiar connection with the testator and his instrument, should be deemed of the first consequence in the proof), and possibly one or more of these may be dispensed with. Whether more proof be requisite on his part must depend upon circumstances, and particularly (the instrument itself appearing regular on its face) upon the mode and force of the opposition developed at the hearing. It is for the contestant, after cross-examining the proponent's witnesses, to enter upon proof of alleged incompetency in the testator or other ground for breaking down the will, before the proponent need put in his whole case, and present affirmatively all he has to offer on such an issue. As to probate of a will and the testimony in such controversies, see *passim*, Book I, Part II. And see *Hastings v. Rider*, 99 Mass. 625, *per* Gray, J.; *Taff v. Hosmer*, 14 Mich. 309, *per* Cooley, J. In such a sense, but not more emphatically, it may be said that when the proponent has proved the due execution of a paper not incompatible in its structure, language, or details, with sanity in the testator, and when, upon such formal testimony, notwithstanding the cross-examination of his own witnesses, it is probable that the will was executed by one at the time in competent testamentary condition, the burden of showing the contrary becomes shifted upon the contestants of the will. And should the contestants thereupon establish incompetent testamentary condition, or other ground for refusing probate of the will, the burden shifts back to the proponent, who, as the result of the whole hearing, is bound to establish satisfactorily the essentials we have stated. But fraud or undue influence must be proved by those who allege it. See *Milton v. Hunter*, 13 Bush. 163; Book I, Part II, cs. 9, 10, and cases cited.

<sup>1</sup> See *passim*, Book I, Part III, cs. 1, 2.

<sup>2</sup> Book I, 233, 317, 326.

<sup>3</sup> 1 Wms. Exrs. 66, 86; Book I, Part III, c. 3.

<sup>4</sup> Book I, Part III, c. 3.

<sup>5</sup> Book I, 346, 347. Burden of contradicting the recitals of attestation clause sustained accordingly. *Ib.*; *Gillmore's Will*, 94 N. W. 32, 117 Wis. 302; *Ward v. Brown*, 44 S. E. 488, 53 W. Va. 227.

<sup>6</sup> See *Barker v. Comins*, 110 Mass. 477 (elements of such testamentary condition). And see *passim*, Book I, Part II, cs. 9, 10. There should on the whole appear (1)

80. The general rule is, that all adult persons are capable of disposing by will; yet there are various classes of persons excepted by the law, not only in this respect, but in other instances involving the *jus disponendi*.<sup>1</sup>

81. Testimony at the hearing should be as exigency may require. The testimony of subscribing witnesses is important but neither indispensable nor conclusive; yet it receives especial favor.<sup>2</sup>

82. Every will being revocable during the testator's lifetime, probate should be granted of the instrument or instruments only which constitute his last will.<sup>3</sup>

83. A will contest is a proceeding *in rem* in its nature, and subject to peculiar conditions; it is not a civil action.<sup>4</sup>

84. A duly executed will which cannot be found after the testator's death is presumed to have been destroyed by him with the intention of revoking it. But this presumption may be rebutted by evidence according to the circumstances.<sup>5</sup>

85. To identify and record as genuine the last will and testament of the deceased is the peculiar province of the probate court; and the probate of a will, not appealed from, or confirmed upon appeal, settles all questions as to the formalities of its execution and the capacity of the testator, though not the validity or invalidity of any particular bequest, nor any question of construction.<sup>6</sup>

86. A probate in fac-simile or with translation accompanying is sometimes granted.<sup>7</sup>

mental capacity; (2) freedom from fraud, coercion or undue influence; (3) a testamentary purpose.

<sup>1</sup> See Book I, Part I, cs. 1-3.

<sup>2</sup> Book I, Part II, cs. 9, 10. If no contest arises, such testimony, establishing an intelligent execution, may suffice.

<sup>3</sup> Book I, Part IV, *passim*.

<sup>4</sup> 78 P. 810; 94 S. W. 522, 195 Mo. 527; *Bradford v. Blossom*, 105 S. W. 289, 207 Mo. 177. Allowance of expenses, etc., to losing party is usually a matter of judicial discretion according to the facts of the case. 69 N. E. 237, 206 Ill. 378; 67 A. 1034, N. J. Prerog.

<sup>5</sup> Book I, 402, etc. Contents and a due execution are sometimes established by secondary proof. The probate court has exclusive original jurisdiction as to establishing lost will, etc. *Beatty v. Clegg*, 73 N. E. 383, 214 Ill. 34.

<sup>6</sup> To construe a will duly probated, and define the rights of parties in interest, remains usually for other tribunals; they must interpret the charter by which the estate should be settled in case of controversy; while the probate court, by right purely of probate or ecclesiastical functions, establishes and confirms that charter. But in order to do this, the probate tribunal throws out the false or the superseded will, or the instrument whose execution does not accord with positive statute requirements; it determines what writing or writings, if any, shall constitute the will. *Supra*, Book I, 223, 248-251. In general, a full probate does not insure against a partial failure in effect.

<sup>7</sup> *Gann v. Gregory*, 3 De G. M. & G. 777; *Wms. Exrs.* 331, 332, 386; 1 P. *Wms.* 526.



87. Probate is not necessarily confined to a single instrument; but several papers may be found to constitute altogether the last will of the deceased, and be entitled to probate accordingly;<sup>1</sup> and letters testamentary may be granted to all the executors named in the several papers.<sup>2</sup>

88. The will having been proved, the original is deposited in the archives of the registry, and a copy entered upon the records; an attested copy being also delivered to the duly qualified executor or administrator with his letters, as constituting the full credentials of his official authority.<sup>3</sup>

89. All nuncupative or oral wills are established in probate by convenient proof of the testator's expressed wishes under appropriate circumstances, and while in a testamentary condition, strict proof being required.<sup>4</sup>

89a. Such is the exclusive jurisdiction of probate courts, the first instance, over all probate of wills, that a court of equity cannot interfere by injunction to prevent an alleged will from being offered, nor otherwise obstruct the probate court in its primary discretion.<sup>5</sup>

<sup>1</sup> Wms. Exrs. 107; *Harley v. Bagshaw*, 2 Phillim. 48; *Tonnele v. Hall*, 4 Comst. 440; *Phelps v. Robbins*, 40 Conn. 250.

<sup>2</sup> *Morgan's Goods*, L. R. 1 P. & D. 323. Cf., as to probate where different executors were appointed for different countries, *Astor, Goods of*, 1 P. D. 150. See also Book I. 280.

Probate granted once at the domicile inures to the benefit of all who may be appointed within the domestic jurisdiction to execute the will and administer the estate. *Watkins v. Brent*, 7 Sim. 512; Wms. Exrs. 382. And though different executors be designated by the will to serve, with distinct powers, or for different periods of time, but one proving of the will is requisite. Wms. Exrs. 382; 1 Freem. 313; Bac. Abr. Exrs. c. 4.

<sup>3</sup> Wms. Exrs. 385, 386 (English practice). In American practice, at this day, certificates under seal are regularly furnished by the registrar of probate as the convenience of individuals may require. See *Allaire v. Allaire*, 37 N. J. L. 312; *Wright v. Mongle*, 10 Lea, 38 (failure to record properly); 96 N. W. 348, 1 Neb. Unoff. 372.

<sup>4</sup> Book I, Part III, c. 4. And see *Mulligan v. Leonard*, 46 Iowa, 692.

<sup>5</sup> *Israel v. Wolf*, 100 Ga. 339, 28 S. E. 109. See also as to Federal courts, 29.

The effect of probate, indeed, aside from the issue of testamentary credentials to an executor, is to authenticate the formal disposition made by decedent as his last will, with all due formalities. But as to the decedent's title to property, or his right to dispose, as declared by him, or the legal meaning or effect of the instrument itself, the probate decides nothing, but leaves all interested parties to settle such controversies by other proceedings, based upon the fact of such probate. *Sumner v. Crane*, 115 Mass. 483, and cases cited. Hence probate is not to be restrained by the objection that the decedent had bound himself by contract to dispose of his property differently, or that the will offered revokes a will made upon contract consideration. See 160, 161; Book I, 456-459. See *Sharp v. Sharp*, 72 N. E. 1058, 213 Ill. 332 (local statute authority to set aside by bill in chancery).

Judges of probate usually determine issues before them without the intervention of a jury. But if appeal be taken on the question of will or no will, a jury trial may be granted; though rather, in most States, upon issues framed under judicial direction, and so that the court may be aided but not controlled by a verdict. See local codes. See also, *Schofield v. Thomas*, 83 N. E. 121, 231 Ill. 114; 83 N. E. 611, 77 Ohio St. 417; *Phillips v. Phillips*, 72 N. E. 1149, 179 N. Y. 585; 80 P. 754, 38 Wash. 442; 77 P. 461, 143 Cal. 580; 108 S. W. 46, 209 Mo. 533; 83 N. Y. S. 830. And see *post*, c. 6.

## CHAPTER III.

## APPOINTMENT OF ORIGINAL AND GENERAL ADMINISTRATORS.

90. **The grant of original and general administration by a probate court corresponds** to that of letters testamentary issued to an executor; its application being, however, in cases where a deceased person whose estate should be settled either died wholly intestate or left a will of which, for some reason, no one can be a qualified executor within the jurisdiction. According to the various cases which may arise, there are various special kinds of administration, besides what may be termed "general administration."<sup>1</sup>

91. **Intestacy is fundamental to the grant of general and original administration** upon the estate of a deceased person; such allegation should be made in the petition, and the court should have reason to believe the statement true.<sup>2</sup> Death of the intestate is of course a fundamental requirement.<sup>3</sup> So, too, as in the probate of a will, primary jurisdiction should be taken in the county where the deceased was domiciled or resided at the time of his death.<sup>4</sup>

92. **Presumptions favor jurisdiction** where the grant is conferred, and this jurisdiction is not usually to be attacked in collateral proceedings, but the order granting administration must

<sup>1</sup> See as to probate jurisdiction, *supra*, 7; Wms. Exrs. 401-404; 31 Edw. 3, c. 11, § 1; 2 Bl. Com. 495.

<sup>2</sup> *Bulkley v. Redmond*, 2 Bradf. Sur. 281. Letters of general administration, granted regardless of the executor, are null and void. *Miller's Estate*, 65 A. 681, 216 Penn. 247; 3 Ired. 557; *Ryno v. Ryno*, 27 N. J. Eq. 522; *Landers v. Stone*, 45 Ind. 404; *Watson v. Glover*, 77 Ala. 323. But see *post*, 135, as to letters of special administration. And as to waiver of an alleged will by all the parties in interest, see (1899) Prob. 187, 191, 247. Our local statutes interpose reasonable delay to grants of administration, in order to give full opportunity for the production of a will.

<sup>3</sup> 1 a; 55.

<sup>4</sup> 21-23, 57. Statutes now in force in most civilized States or countries expressly provide for administration upon the estate of persons who die resident abroad, leaving property to be administered within the domestic jurisdiction. Hence original general administration may be granted upon either of two distinct grounds: (1) last domicile or residence; or (2) in case of non-residence, assets within the local jurisdiction of State or country. 24-27, 116, 117; *Wilkins v. Ellett*, 108 U. S. 256, 27 L. Ed. 718; *Little v. Sinnett*, 7 Iowa, 324. Generally, personal estate is requisite for conferring such jurisdiction; or estate, at least, which in a due course of administration would be converted into personalty. *Crosby v. Leavitt*, 4 Allen, 410; *Grimes v. Talbert*, 14 Md. 169; 2 Met. (Ky.) 306; *Jeffersonville R. v. Swayne*, 26 Md. 474; *Boughton v. Bradley*, 34 Ala. 694, 73 Am. Dec. 474. See as to land, 24-27; *Bishop v. Lalouette*, 67 Ala. 197; *Temples v. Cain*, 60 Miss. 478; *Lees v. Wetmore*, 58 Iowa, 170, 12 N. W. 238. Claim of damages for death from negligence is deemed local assets. See 24-27; *Reiter-Conley Co. v. Hamlin*, 40 So. 280, 144 Ala. 192. Statutes are found conferring right. But as to statute claim for damages solely for benefit of widow and next of kin, cf. *Perry v. St. Joseph R.*, 29 Kan. 420.

be reversed on appeal, or the letters themselves revoked or vacated.<sup>1</sup> But, if the person upon whose estate letters were issued proves not to have died in fact, the grant is without jurisdiction.<sup>2</sup> Nor can a county court rightfully grant administration, unless either the deceased was domiciled (or resident) therein, at the time of his decease, or, if a non-resident of the State or country, has left suitable property in the county to be administered upon.<sup>3</sup>

93. **A limitation of value is set to the grant of original administration**, under some statutes, so that the court cannot grant letters, unless there appears to be estate of the deceased amounting, at all events, to a specified sum.<sup>4</sup> But apart from express acts of this tenor, no such particular amount appears requisite.<sup>5</sup>

94. **Statutes are found which expressly limit the time within which original administration must be applied for;**<sup>6</sup> though no such limits are set to the probate of a will.<sup>7</sup>

<sup>1</sup> *Roderigas v. East River Savings Inst.*, 63 N. Y. 460, 20 Am. Rep. 555; 46 N. J. L. 211; *Hobson v. Ewan*, 62 Ill. 146; *McFeeley v. Scott*, 128 Mass. 16; 160.

<sup>2</sup> *Jochumsen v. Suffolk Savings Bank*, 3 Allen, 87; *Moore v. Smith*, 11 Rich. 569, 73 Am. Dec. 122; *Hooper v. Stewart*, 25 Ala. 408, 60 Am. Dec. 527; *D'Arusment v. Jones*, 4 Lea, 251, 40 Am. Rep. 12; 1a. The person whose estate was committed to administration may claim, if alive, that his property was taken without due process of law. 18 Blatchf. 1; *Burns v. Van Loam*, 29 La. Ann. 560. Sentence of a person to imprisonment for life does not justify the grant of administration upon his estate as of one "civilly dead." *Frazer v. Fulcher*, 17 Ohio, 260; 50 Hun. (N. Y.) 523. Even if the person, in fact alive, had been absent and not heard of for fifteen years, the grant of letters is void. *Devlin v. Commonwealth*, 101 Penn. St. 273, 47 Am. Rep. 710. And see *Scott v. McNeal*, 154 U. S. 34, 38 L. Ed. 896; 107 N. Y. S. 491. But local codes may change such rule and allow administration after seven years. *N. Y. Life Co. v. Chittenden*, 112 N. W. 96, 134 Iowa, 613, 11 L. R. A. (N. S.) 233. See *Wisconsin Trust Co. v. Wisconsin Bank*, 81 N. W. 642, 105 Wis. 464.

<sup>3</sup> See 26, *supra*; 7 S. W. 357; *Moore v. Moore*, 33 Neb. 509, 50 N. W. 443.

<sup>4</sup> *E.g.* twenty dollars or unpaid debts of that value. 22 Me. 549. Estates less than three hundred dollars. 12 Ind. 533. See *Bean v. Bumpus*, 22 Me. 549; 81 Me. 207; local codes.

<sup>5</sup> *Pinney v. McGregory*, 102 Mass. 89; 3 Allen, 87. In general, the existence of assets within the State or country is essential only when the jurisdiction concerns the estate of a non-resident deceased person; the situation of estate being here the test. but in principal grants simply the last residence or domicile of the deceased. *Harlan's Estate*, 24 Cal. 182, 85 Am. Dec. 58; *Watson v. Collins*, 37 Ala. 587; 24 *supra*.

Administration may be granted for procuring assets by litigation, on behalf of creditors, for instance, who seek to set aside a conveyance claimed to be fraudulent and voidable. *Nugent's Estate*, 77 Mich. 500, 43 N. W. 889; 148 Mass. 248, 19 N. E. 370. Trust or partnership property, however, is not estate to be administered, but an individual's own property is the criterion. See *Shaw's Appeal*, 81 Me. 207, 16 A. 662; 4 Mason 16, 29; *Johnson v. Ames*, 11 Pick. 173.

<sup>6</sup> *E.g.* twenty years, except as to property coming later to knowledge, etc. See *Foster v. Commonwealth*, 35 Penn. St. 148; 102 Mass. 89; *Parsons v. Spaulding*, 130 Mass. 83; *Brooks, Re*, 110 Mich. 8; *Lloyd v. Mason*, 38 Tex. 212 (four years); *Whit v. Ray*, 4 Ired. 14; 49 Conn. 411 (seven years); *Todhunter v. Stewart*, 39 Ohio St. 181; 18 Ga. 520 (so as to quiet titles); *Colburn's Appeal*, 56 A. 608, 76 Conn. 378.

<sup>7</sup> *Supra*, 56; *Shumway v. Holbrook*, 1 Pick. 114. See *Wms. Exrs.* 452, 453; 3 Hagg. 565.

95. While other letters granted and confirmed as of a testate estate or to an original administrator remain in full force within the same general and appropriate jurisdiction, there can be no new grant of original and general administration.<sup>1</sup>

96. Letters of administration are often issued upon the mere allegations of the petitioner, aided by the public nature of the proceedings, and the requirement of a bond for general security. Where such is the practice, the grant itself must needs afford very little proof of the facts essential to jurisdiction, unless those facts were controverted; and the administrator should act accordingly, under a full sense of the perilous responsibilities with which he has been invested.<sup>2</sup>

97. As to the persons to whom general administration should be granted, local legislation at the present day expressly regulates the whole subject.<sup>3</sup> The fundamental principle of both English and American enactments now in force on this subject is, that the right to administer, wherever the deceased chose no executor, shall go according to the beneficial interest in the estate; a principle which may yield, however, to other considerations of sound policy and convenience.<sup>4</sup>

98. A surviving husband's right to administer upon the estate of his deceased wife long excluded kindred in preference.<sup>5</sup> The modern creation of a separate estate on the wife's behalf changes this old rule considerably; nor can the husband in these days be said to administer so exclusively for his own benefit as formerly.<sup>6</sup>

<sup>1</sup> *Landers v. Stone*, 45 Ind. 404; *Slade v. Washburn*, 3 Ired. L. 557; 58 N. E. 734 (wrong county); *King's Estate*, 105 Iowa, 320, 75 N. W. 187. But as to the county first taking jurisdiction, in case of local assets conferring a double jurisdiction, see 24, *supra*. As to real estate, see *Chamberlin v. Wilson*, 45 Iowa, 149. As to a land claim, see *Fletcher v. McArthur*, 68 Fed. 65; 58 Fed. 51, 65, 29 L. R. A. 73.

<sup>2</sup> But the probate judge in each case has sound discretion to investigate and determine as to death and other facts fundamental to the grant of administration; and in some States the judicial nature of the inquiry in the probate court, and the necessity of requiring due proof, appear to be strongly insisted upon. See *Roderigas v. East River Savings Inst.*, 63 N. Y. 460; 2 Bradf. Sur. 281; 16 La. Ann. 13; *Burns v. Van Loan*, 29 La. Ann. 560; 70 P. 369, 65 Kan. 484, 93 Am. St. Rep. 299; 107 N. Y. S. 491; 105 S. W. 952.

<sup>3</sup> See Stats. 31 Edw. III, c. 11, and 21 Henry VIII, c. 5, § 3; *Wms. Exrs.* 409, 436 ("the next and most lawful friends of the dead person intestate"), with judicial discretion as between widow and next of kin, or as among kindred of equal degree.

<sup>4</sup> 51 Mich. 29, 16 N. W. 188. Preference at time of application. But see local statutes; *Griffith v. Coleman*, 61 Md. 250.

<sup>5</sup> See *Wms. Exrs.* 410; *Schoul. Hus. & Wife*, § 405; 2 Phillim. 19. This fully harmonized with the old rule of coverture. 6 John. 117; 6 Jur. 50.

<sup>6</sup> *Schoul. Hus. & Wife*, §§ 408, 409; *Distribution*, 492 *et seq.*

See as to wife living apart, *Stephenson, Goods of*, L. R. 1 P. & D. 285. And as to husband's misconduct, (1898) P. 147; *Coover's Appeal*, 52 Penn. St. 427; *Cooper v. Maddox*, 2 Sneed, 135.

The wife's will, lawfully made and operating, may control a surviving husband's right to administer.<sup>1</sup> And, in general, that the husband may be preferred in the trust, it is assumed that he is both competent and willing to exercise it.<sup>2</sup>

99. **The surviving wife's right to administer on her husband's estate is not**, under most statutes which regulate the grant of general administration, co-extensive with the right of a surviving husband. The husband in the one instance is preferred to all others; but in the other, kindred and the widow stand apparently upon an equal footing, though not unfrequently parties adverse in point of fact.<sup>3</sup>

In most parts of the United States the husband's exclusive preference to administer on his wife's estate is recognized by statute. See, upon this point, 38 Md. 175; *Willis v. Jones*, 42 Md. 422; *Fairbanks v. Hill*, 3 Lea, 732; 16 Barb. 556; *Happiss v. Eskridge*, 2 Ired. Eq. 54; *Clark v. Clark*, 6 W. & S. 85. To deprive him of such right, the statute should be clear and positive in terms. A written agreement for separation, in contemplation of a divorce, will not deprive him presumably. *Willis v. Jones*, 42 Md. 422. Nor presumably will an ante-nuptial settlement for the wife's benefit. *Hart v. Soward*, 12 B. Mon. 391. Nor the fact of non-residence. *Weaver v. Chace*, 5 R. I. 356. Nor relinquishment of rights to her property by a post-nuptial contract. *O'Rear v. Crum*, 135 Ill. 294, 25 N. E. 1097. But cf. 6 Gill & J. 349; 22 Miss. 68; 117 Mo. App. 629.

But in some States the husband is not entitled to administer to the exclusion of the children. *Randall v. Shrader*, 17 Ala. 333; *Williamson's Succession*, 3 La. Ann. 261; *Goodrich v. Treat*, 3 Col. 408. This will become further apparent when Distribution is considered, *post*, and it is perceived that the surviving husband must share the estate with children or other kindred; for the general principle is that the right to administer follows the interest in the estate.

<sup>1</sup> See Book I, Part II, c. 3, *supra*. See also, 15 Ves. 139.

Administration granted upon the estate of a married woman as though she were single may be revoked for error. (1893) P. 16. Want of pecuniary interest does not debar him. *O'Rear v. Crum*, 135 Ill. 294, 25 N. E. 1097.

<sup>2</sup> An annulment of the marriage or a divorce absolute debars the husband completely.

<sup>3</sup> Such is the rule of England. *Wms. Exrs.* 416; 2 Sw. & Tr. 634; L. R. 1 P. & D. 459; *Widgery v. Tepper*, 5 Ch. D. 516. Administration granted at the court's discretion "to the widow or the next of kin or to both." Stat. 24 Hen. VIII, c. 5, § 3. And it prevails in most parts of the United States. As we shall see hereafter, the division of interests as between widow and kindred is its basis. 2 Kent Com. 410, 411, and notes. But see next section. A non-resident widow objectionable for administration. *O'Brien's Estate*, 63 Iowa, 622, 19 N. W. 797; *Ehlen v. Ehlen*, 64 Md. 360, 1 A. 880. As to annulled marriage or full divorce, see *O'Gara v. Eisenlohr*, 38 N. Y. 296; *Schoul. Hus. & Wife*, § 559; *Boyd's Appeal*, 38 Penn. St. 246. As to voidable marriage or partial divorce or mere separation, see *Wms. Exrs.* 418; 3 Hagg. 217, 556. One may leave a lawful widow, by remarrying after a divorce. *Ryan v. Ryan*, 2 Phillim. 332. See also *Nusz v. Grove*, 27 Md. 391; *Odiorne's Appeal*, 54 Penn. St. 175, 93 Am. Dec. 683. But discretion of court applies. Administration refused to a wife divorced from bed and board because of her adultery. *Davies, Goods of*, 2 Curt. 628; *Wms. Exrs.* 418. Refused to a wife dissipated and an eloper. *Stevens's Goods*, (1898) P. 126. See Stat. 20 & 21 Vict. c. 77, § 73 (refusal under "special circumstances").

Marriage settlements may exclude the rights of one surviving spouse as well as the other. *Schoul. Hus. & Wife*, § 363; 2 Cas. temp. Lee, 560.

Notwithstanding the statute expression, English courts in modern practice select the widow to administer, in preference to the next of kin, unless good reason appears for appointing differently. *Goddard v. Goddard*, 3 Phillim. 638; *Wms. Exrs.* 417. But with ancillary administration it might be otherwise. *Rogerson's Goods*, 2 Curt.

100. **The American rule as between widow and kindred must be gathered from a variety of acts applicable in different States.**<sup>1</sup>

101. **The right of an intestate's next of kin to administer, as well as to take the residue of the personalty by way of distribution after settling all claims, is paramount, subject to the possible claims of surviving husband or widow already noted. These "next of kin," or "next and most lawful friends" of the deceased (to use the language of the old statute<sup>2</sup>) Lord Coke defines as "the next of blood who are not attainted of treason, felony, or have any other disability."**<sup>3</sup>

656. See 4 Mass. 348; 5 La. Ann. 689; 14 Miss. 448; 36 So. 594, 112 La. 572, 64 P. 402, 132 Cal. 309. Laches may defeat right. 61 S. W. 776, 106 Tenn. 434 (five years' delay); 72 N. E. 114, 213 Ill. 488. As against next of kin of remote degree or creditors, the wife deserves the strongest consideration; and even children should respect a surviving parent. Administration may doubtless be granted to both widow and next of kin; but a sole and harmonious administration is always preferred in practice to a joint and divided one. Wms. Exrs. 417; 1 Salk. 36. See as to consent, Newbold, Goods of, L. R. 1 P. & D. 285.

<sup>1</sup> See McClellan's Appeal, 16 Penn. St. 110; 2 Kent Com. 410, 411. A preference of the widow to children and other kindred is expressly accorded by the statutes of New York and certain other States. 6 Sm. & M. 448; Lathrop v. Smith, 24 N. Y. 417; 2 Strobb. 335; Curtis v. Williams, 33 Ala. 570. Illiteracy and poverty or old age do not *per se* deprive a widow of her statutory preferred right. Bowersox's Appeal, 100 Penn. St. 434, 45 Am. Rep. 387; 108 Penn. St. 567. Where there are no children or descendants of children, the widow's larger distributive interest in the surplus of the estate may render her all the more preferable to kindred. See Swan v. Swan, 3 Head, 163.

Courts have held that the re-marriage of the widow is *per se* no valid objection to her claim to administer; but if children unite in their choice as against her, under such circumstances, it seems proper that they should at least have a co-administrator appointed. Webb v. Needham, 1 Add. 494. Both in England and the United States, where the widow is heir and distributee, and for aught that is known the only one, she will be appointed in preference to any stranger. Cobb v. Newcomb, 19 Pick. 336; Block, Succession of, 6 La. Ann. 810; Atwood's Estate, 59 P. 770, 127 Cal. 427.

<sup>2</sup> 31 Edw. III, c. 11.

<sup>3</sup> 9 Co. Rep. 39 b. In general, no one comes within the term "next of kin" who is not included in the provisions of the statutes of distribution hereafter to be detailed. And, as we have stated, the fundamental principle in the award of administration is that the right to administer upon the estate of an intestate follows the interest or right of property therein. 3 Atk. 422, *per* Sir John Nicholl; 1 Hagg. 342; Wms. Exrs. 419. In most American States the statutes of distribution fix the order of preference among kindred with much precision. And the general rule is, that where there is neither husband nor wife of the intestate surviving, administration shall be granted to one or more of the distributees, if such be competent and desirous of serving. Hawkins v. Robinson, 3 B. Mon. 141.

As between husband and wife, neither can, by virtue of the marriage relation alone, be regarded as next of kin to the other, for they are not blood relatives; and this reservation extends to all marriage connections. 3 Ves. 244; 2 Kent Com. 136, 142; Whitaker v. Whitaker, 6 Johns. 112. Consanguinity or kindred, in fact, is that relationship of persons which is derived from the same stock, or a common ancestor and common blood in the veins. Consanguinity is either collateral or lineal. 2 Bl. Com. 202-205. A simple perpendicular line on the chart, against which names are written, shows the lineal kindred of any person deceased intestate; while connecting lines, centered at some preceding name of a common ancestor, exhibit the collateral kindred. See table of consanguinity at the end of this book.

102. In order to ascertain who are next of kin and lawfully preferable for administration, we reckon from the deceased intestate to the nearest in degree of blood surviving him.<sup>1</sup>

103. It is plain that one may die leaving various parties related to him in the same degree of kindred, but in different classes, and without any common bond of affection. Further rules of discrimination have, therefore, been established for convenience.<sup>2</sup>

<sup>1</sup> By the rule alike of the civil, canon and common law, every generation in the direct course of relationship makes a degree for computing the degree of lineal consanguinity; or, in other words, we are to count either directly upwards or directly downwards to the nearest relative who survived the deceased. Father and son are both in the first lineal degree; grandfather and grandson both in the second. Collateral consanguinity, according to the preferable method, is computed by a similar process, extended into the diverging lines; that is to say, we count upwards to the common ancestor of both the deceased and the surviving kinsman, and then follow the branch downwards until the kinsman is reached, reckoning one degree for each generation. Hence, following the civil method, we pronounce the intestate's brother in the second degree, both his uncle and nephew in the third degree, and his cousin in the fourth. See 2 Bl. Com. 202, 207; Wms. Exrs. 421; 1 Ves. Sen. 335.

Other rules in this connection deserve consideration: (1) Relatives of the deceased by the father's side and the mother's side stand in equal degree of kinship, so that, in tracing out pedigree beyond one's immediate family, two trees may be required for comparison. Wms. Exrs. 422; 1 P. Wms. 53. Local statutes sometimes discriminate in favor of relatives on the father's side. 28 Md. 408. (2) Half-blood must be reckoned as, on principle and save for old feudal disabilities concerning the inheritance of lands, entitled equally with the whole blood; so that the half-brother stands in higher degree than the full uncle. 1 Vent. 424. And see 2 Bl. Com. 505. To this, however, are found statute exceptions in favor of the whole blood. 31 L. J. P. M. & A. 48; Wms. Exrs. 427. (3) Primogeniture gives no preference of administration among kindred of the same degree, as matter of right; and, indeed, in the United States the modern rule is to dispense altogether with legal distinctions in favor of the first-born of a family. Wms. Exrs. 423; 1 Phillim. 124; Distribution, *post*; Shomo's Appeal, 57 Penn. St. 356. (4) The right to administer, as to kindred, will follow the proximity of kindred; and kindred of the nearest degree accordingly take precedence over those more remote, as the true "next of kin." Thus, if one dies leaving no children, but parents, these are of the first degree by reckoning; and their rights are accordingly superior to those of brother and sister, who occupy the second degree. 1 P. Wms. 51; Wms. Exrs. 423; Brown v. Hay, 1 Stew. & P. 102. Indeed, the rights of parents in such a case are theoretically paramount and equal. But the old doctrines of the common law forbade the theory that mother and father should have equal title as parents; and some statutes distribute the estate of an intestate equally between mother, brothers, and sisters, where there is no surviving father. Wms. Exrs. 423; Distribution, *post*; 1 P. Wms. 45; 1 Ld. Raym. 686.

<sup>2</sup> A certain preference among kindred, in fact, is regarded, in according rights of administration, as well as in legal descent and distribution; natural affection and the natural instincts of family influencing, no doubt, such a selection. Thus, should one die, leaving a child or children, these among kindred are the closest to him; and though of the same degree as his father or mother, they should be preferred. 2 Bl. Com. 504; Withy v. Mangles, 4 Beav. 358. And the same consideration gives precedence to lineal descendants in the remotest degree; or, in other words, the stock one has founded takes the priority of that from which he was derived. Evelyn v. Evelyn, 3 Atk. 762; s. c. Amb. 191. As between one's own brothers and sisters and his grandparents, though both classes are of the second degree, yet the ties are knit less closely in the latter case than in the former; hence, and to avoid dispersion of the estate among more remote branches of the family, brothers and sisters are preferred. Evelyn v. Evelyn, *supra*; 1 P. Wms. 45; Wms. Exrs. 424.

104. As among the next of kin, or persons all of the same class in respect of a legal right to administer, the actual choice of administrator by the court may be guided by various considerations. Personal suitability, for instance, is a very important element, whether in determining the appointment as between the widow and next of kin of an intestate, or where one or more next of kin alone are concerned.<sup>1</sup>

All these discriminations are fundamental in English and American law. Others may be traced, in the legislation of certain States, which are founded in reasons less forcible, and operate by virtue of local laws, largely of an experimental character. To this latter class may be referred the preference, in case both parents survive the intestate, which the father takes over the mother. *Wms. Exrs.* 423; *Blackborough v. Davis*, 1 P. *Wms.* 51. And see as to Distribution, *post*; *Aleyn* 36; *Wms. Exrs.* 424. The common law selects the collateral of nearer degree, rather than the ascendants of more remote; and this, too, is a matter of statute definition in various States. 1 P. *Wms.* 58; *Wms. Exrs.* 424. There are limits to right of representation, as we shall see hereafter; but whether entitled to take the ancestor's share in the final distribution or not, the representative may well be subordinated in the grant of administration. See 1 Root. 52 (daughter preferred to son of eldest son); 60 N. Y. S. 382.

Often the person designated by local statute to administer in preference may have disproportioned rights in the estate, or perhaps no beneficial right therein at all. *Lathrop v. Smith*, 24 N. Y. 417. But where the statute does not settle the right to administer, the question, who is entitled to the surplus of the intestate's personal estate, must generally be the practical test. *Sweezy v. Willis*, 1 Bradf. Sur. 495.

<sup>1</sup> A widow evidently unsuitable may be passed over in favor of the next of kin; but if the next of kin are all unsuitable, the widow, being competent, is entitled to the sole administration; while, if both widow and next of kin are unsuitable, the application of all should be refused. *Stearns v. Fiske*, 18 Pick. 24. Suitableness is an element of especial importance in States which have legislated on this point. And so, too, where only next of kin of a certain class are concerned in the administration, if one is suitable and the others are unsuitable, the suitable one will be taken; if two or more are equally entitled, equally suitable, and equally strenuous to be appointed, the court has power to appoint one or more of them; but if all are unsuitable, the appointment must be otherwise bestowed. From among two or more persons equally akin to the deceased, the court may choose the most suitable at discretion. See 2 Cal. (N. Y.) Cas. 143; *Moore v. Moore*, 1 Dev. (N. C.) 268.

As to suitableness, there are numerous decisions, just as there are various kinds and degrees of unsuitableness. Separation of husband and wife, apart from the question of fault, does not disqualify. 98, 99. Nor does inability to read or write. Nor ignorance of the language, where intelligent in one's own tongue. *Nusz v. Grove*, 27 Md. 391; 1 Ashm. 49; 108 Cal. 484, 41 P. 486. Nor illiteracy nor narrow means. *Emerson v. Bowers*, 14 N. Y. 449; *Levan's Appeal*, 3 A. 804, 112 Penn. St. 297; *Small ex parte*, 48 S. E. 40, 69 S. C. 43. Nor habits of intemperance. *Elmer v. Kechele*, 1 Redf. (N. Y.) 472. Nor old age. 3 Demarest, 263. Nor the bare fact of intermeddling with the effects before appointment. *Bingham v. Crenshaw*, 34 Ala. 693. Nor that the party in interest is a nun or priest. *Smith v. Young*, 5 Gill, 197. "Conviction of infamous crime" is sometimes a statute disqualification; i. e., conviction of an offence against local law. *O'Brien, Re*, 3 Demarest, 156; 96 N. Y. S. 98 (as to U. S. court). The question as to "improvidence" is whether it is such as is likely to endanger the safety of the estate. 5 Dem. (N. Y.) 456; 3 Dem. 156; 6 N. Y. 443; 14 N. Y. 449; 84 N. Y. S. 1102. But, as between individuals of the same class, moral fitness and integrity may well be considered in the selection; also efficiency of mind and body; also business habits and experience in the management of estates. 1 Barb. Ch. 45; *McMahon v. Harrison*, 6 N. Y. 443; *Stephenson v. Stephenson*, 4 Jones L. 472; *Williams v. Wilkins*, 2 Phillim. 100. A bankrupt or an insolvent is an unsuitable person for the trust of administrator, especially if embarrassed habitually. *Cornpropst's Appeal*, 33 Penn.



105. **By the old rule males have no preference over females**, in the grant of administration to the next of kin, though in the succession of lands feudal law pronounced otherwise. But on practical considerations of suitableness, where the settlement of an estate is involved and various kindred are to be protected, woman herself generally desires a man's management; and hence, aside from the discretionary choice of a court, there are local statutes which distinctly place the male next of kin before the female, for receiving the appointment.<sup>1</sup> So may it be thought fit that the younger and less discreet should yield to the older under some circumstances.<sup>2</sup>

106. **Husband's administration in his wife's right** was the old familiar rule of common law.<sup>3</sup> But local legislation now controls the subject.<sup>4</sup>

St. 537; *Bell v. Timiswood*, 2 Phillim. 22. Cf. 26 W. R. 760; 112 Penn. St. 294, 3 A. 804. One may be considered unsuitable for the appointment, who holds already some other trust, whose interests decidedly conflict with those of the estate in question. *State v. Reinhardt*, 31 Mo. 95. Cf. *Wright v. Wright*, 72 Ind. 149. Or who is largely indebted to the estate, especially if the amount due has not been ascertained. Or who was partner of the deceased at the time of his death. *Cornell v. Gallagher*, 16 Cal. 367; 11 Phila. (Pa.) 127. Or who is hostile to another of the next of kin. *Drew's Appeal*, 58 N. H. 317. Or who is otherwise so adversely interested to heirs, creditors, or other kindred, as to prejudice the due settlement of the estate, if placed under his charge. *Pickering v. Pendexter*, 46 N. H. 69; *Moody v. Moody*, 29 Ga. 515; 6 Phila. (Pa.) 87. And see *Webb v. Needham*, 1 Add. 494 (a creditor). See further various statute disabilities prescribed. *McMahon v. Harrison*, 6 N. Y. 443 ("drunkenness, improvidence," etc.); 4 Jones L. 472 (illiteracy, etc.). For the administrator should be interested in settling the estate, not unfaithfully or partially, but faithfully, and for the welfare of all concerned.

Unsuitableness is not overcome by the fact that the party personally unsuitable is ready to give ample bonds with sureties for the faithful performance of his trust; though this is doubtless of great advantage to overcome a doubt. See *Stearns v. Fiske*, 18 Pick. 27.

<sup>1</sup> 2 N. Y. Rev. Stat. 74, § 28; 9 Gill, 463; *Cook v. Carr*, 19 Md. 1. But other considerations, such as minority or non-residence of male relatives, may control this rule. 15 Barb. 302; *Hill's Case*, 37 A. 952, 55 N. J. Eq. 764; 64 P. 691, 132 Cal. 401.

<sup>2</sup> *Wms. Exrs.* 427; 1 Phillim. 125; 4 Hagg. 376.

<sup>3</sup> *Schoul. Hus. & Wife*, § 163; *Dardier v. Chapman*, L. R. 11 Ch. D. 442; 2 Bradf. Sur. 153; 3 Ind. 268; 8 Ark. 241; 5 Port. (Ala.) 64. And see *Dowty v. Hall*, 83 Ala. 165, 3 So. 815.

<sup>4</sup> *Stewart, In re*, 56 Me. 300; *Binnerman v. Weaver*, 8 Md. 517; *Wms. Exrs.* 450; *Schoul. Hus. & Wife*, appendix. Changes in this doctrine are introduced by modern equity, and the married woman's acts; thus, the wife may be sole fiduciary, in England and some American States, with or perhaps without her husband's consent. As to husband's joinder in wife's bond, see 32 Tex. 131; *Cassedy v. Jackson*, 45 Miss. 397. Legislation sometimes debars husband from succeeding to his wife's right to administer. 7 Mass. 510; 37 Wis. 450; *Guldin's Estate*, 81 Penn. St. 362.

Local statutes are found which give unmarried women the appointment in preference to married women. 9 Gill, 463; *Smith v. Young*, 5 Gill, 197; *Curser, Re*, 89 N. Y. 401. See 2 Curt. 640 (administration granted to a wife living separate from her husband).

107. **Insane persons are doubtless unsuitable for the personal trust of administrator, and, indeed, incompetent to serve.**<sup>1</sup> So, too, are infants.<sup>2</sup> The usual disqualifications of an executor extend to administrators; and other disqualifications are sometimes annexed.<sup>3</sup>

108. **As to illegitimacy, the peculiar rules of distribution, as defined by statute, must be applied for determining the right to administer; whether the case be one of an illegitimate decedent or of illegitimate relationship to a decedent.**<sup>4</sup>

109. **Non-residence is an objection to the appointment;**<sup>5</sup> but in practice not usually a decisive one, especially as between residents in different parts of the United States.<sup>6</sup>

110. **Other considerations apply for determining the choice.** One between next of kin, in cases of doubt, may be their relative extent of interest.<sup>7</sup> But another important one is, the confidence

<sup>1</sup> *McGooch v. McGooch*, 4 Mass. 348; *McMahon v. Harrison*, 6 N. Y. 443 (statute)-Guardian of a sole next of kin who is insane, allowed to administer in his stead. (1894) P. 160; *Mowry v. Latham*, 17 R. I. 480, 23 A. 13.

<sup>2</sup> See *post*, 132, as to administration during minority. And see 2 Edw. (N. Y.) 57; *Collins v. Spears*, 1 Miss. 310. That the minor is married does not qualify her. *Briscoe v. Tarkington*, 5 La. Ann. 692. Nor that there is no other next of kin capable to administer. *Rea v. Englesing*, 56 Miss. 463. As to guardian of minor, see 77 P. 144, 143 Cal. 438.

<sup>3</sup> 1 Wms. Exrs. 449 mentions attainder of treason or felony, outlawry, etc. The statute of New York enumerates, among other special disqualifications, the conviction of an infamous crime. See *McMahon v. Harrison*, 6 N. Y. 443. And see Stat. 33 & 34 Vict. c. 23; Wms. Exrs. 435; *supra*, 33. See further, 114. As to appointing trustee of a bankrupt daughter, see 92 N. W. 101, 131 Mich. 577.

<sup>4</sup> 48 S. E. 134, 120 Ga. 642; 36 S. E. 908, 58 S. C. 469; 101 S. W. 791, 160 Tex. 515; 44 Wash. 513, 87 P. 841. See 1 Bradf. 125; *Pico's Estate*, 56 Cal. 513, 38 Am. Rep. 67; 3 Bradf. 249; *Schoul. Dom. Relations*, § 276; Wms. Exrs. 433; *Goodman, Re*, L. R. 17 Ch. D. 266.

<sup>5</sup> *Child v. Gratiot*, 41 Ill. 357; 5 Dana, 156; 15 Barb. 302.

<sup>6</sup> Some States treat such appointments as impolitic. *Chicago R. v. Gould*, 64 Iowa, 343, 20 N. W. 464; *Sargent, Re*, 62 Wis. 130, 22 N. W. 131; 63 Cal. 458; 80 P. 828, 78 P. 705; *Campbell's Estate*, 85 N. E. 392, 192 N. Y. 312, 18 L. R. A. (N. S.) 606; *Frick's Appeal*, 114 Penn. St. 29. But other States permit the non-resident next of kin to serve as administrator upon duly qualifying with resident sureties; and perhaps such an administrator must further appoint a resident attorney who shall accept service on his behalf and in general represent him. Mass. Public Stat. c. 132, § 8; *Robie's Estate*, *Myrick* (Cal.) 226. And see 2 Leigh, 710; 12 Rich. 623. Local statutes vary. So might the resident nominee of a non-resident kinsman be taken where no suitable kinsman within the State desired to administer. *Smith v. Munroe*, 1 Ired. L. 345. See *post*, 116; 2 Sw. & Tr. 139. Alienage is considered no incapacity in England as concerns personal estate; but some American statutes exclude or restrict the right of aliens, and particularly non-resident aliens, to administer. Wms. Exrs. 449, 468; *Redf. Surr. Pract.* 138; 4 Dem. (N. Y.) 33. As among next of kin, some resident and some non-resident, those resident, if otherwise suitable, or their nominee, would seem worthy of a preference. 5 Dem. (N. Y.) 292; (1898) P. 11. See further, *Pickering v. Pendexter*, 46 N. H. 69; 1 Robert. 468; 2 Bradf. 105 (attorney of foreign executor).

<sup>7</sup> *Leverett v. Dismukes*, 10 Ga. 98.

reposed by kindred; and hence, in cases of conflict, it is not unfrequent to appoint the one upon whom a majority of the parties in interest agree.<sup>1</sup> The wishes of the party or parties having the largest amount of interest may in other respects preponderate in the selection of administrator.<sup>2</sup> The party first seeking the appointment has some claim to preference.<sup>3</sup>

111. **The codes of many States now specify in order the classes who shall be entitled to administer, if otherwise competent.**<sup>4</sup>

112. **Those entitled by preference must be summoned to appear and exercise their right if they so desire.** For the rule, long established in ecclesiastical and probate practice, is that the party having a prior right should be cited, or else waive his right, before administration can be granted to any other person.<sup>5</sup> A similar

<sup>1</sup> *Mandeville v. Mandeville*, 35 Ga. 243. This course is sometimes directed by statute. But it is an old established rule in English ecclesiastical practice, though not invariable. 1 Freem. 258; Wms. Exrs. 426; 2 Phillim. 115, 248. See Stainton's Goods, L. R. 2 P. & D. 212.

<sup>2</sup> *McClellan's Appeal*, 16 Penn. St. 110.

<sup>3</sup> 29 Jur. N. S. 587; Wms. Exrs. 427, 428. Whether a sole or a joint administration is preferable, the court may decide. See Wms. Exrs. 428; 4 Hagg. 376, 398; *Reed v. Howe*, 13 Iowa, 50. Two separate co-ordinate administrations cannot be granted. *Brubaker's Appeal*, 98 Penn. St. 21.

In all the above considerations, the court exercises a just and liberal discretion, unless the statute is peremptory.

<sup>4</sup> After providing as to surviving husband or widow, they usually name first, children (with their lineal descendants, it may be presumed); next, the father; next, the mother (or else mother, brothers and sisters); next, if there are neither children nor parents, the brothers and sisters; next, the grandparents; next, nephews, nieces, uncles, aunts; next, first cousins. On principle, it would appear, that, as in distribution, the right to administer as "next of kin" is limited to the class which fulfils that description at the intestate's death, and takes the surplus; thus excluding more distant kindred not beneficially entitled. *Cobb v. Newcomb*, 19 Pick. 337. This is the English rule. Wms. Exrs. 437. Hence, where all next of kin at intestate's death are dead, their representative is entitled. *Ib.* See also, *Edson's Estate*, 77 P. 451, 143 Cal. 607. But according to the law of certain States, it is quite otherwise. 2 Bradf. 304; 2 Murph. 268; 5 Cal. 63; *McClellan's Appeal*, 16 Penn. St. 110; 2 Miss. 568. American statutes vary greatly in scope, however, and in each State the law must be construed according to the legislative expression.

<sup>5</sup> The citation is sometimes by a personal service; but frequently, in our modern practice, by posters or a simple newspaper publication, the method being fixed by statute or a rule of court, and the citation issuing from the register's office when one's petition to administer is presented; the course being similar to that pursued in obtaining letters testamentary, and as preliminary to the formal hearing. To dispense with the citation, those of the class entitled to preference should renounce their claim or signify their assent to the grant of the petitioner's request by indorsement upon the petition or other writing of record. Wms. Exrs. 440, 448; 1 Curt. 592; 19 Pick. 336; 1 Cush. 525; 16 La. Ann. 230; 12 Geo. 526. See 2 McCord 309. As to affidavit that citation was given, see *Gillett v. Needham*, 37 Mich. 143. As to renunciation in writing, see *Barber v. Converse*, 1 Redf. (N. Y.) 330. And grant of letters by the court should follow reasonably soon upon the citation, as otherwise a new citation or notice may be requisite. *Elgutter v. Missouri R.*, 53 Neb. 748. Cf. local statute on such points. Letters issued in disregard of rule of citation are held voidable at least. 95 N. C. 353; *Jones v. Bittinger*, 110 Ind. 476, 11 N. E. 456; 40 N. J. Eq. 184; *post*, c. 6; 108 N. Y. S. 281; *Brandage's Estate*, 75 P. 175, 141 Cal. 538.

procedure appears highly suitable where one of the class entitled to preference desires an appointment, as against others of the same class and equal in right.<sup>1</sup> Renunciation or waiver of the right should appear of record in order to bind the parties first entitled to administer; nor is the language of such a writing to be strained beyond the obvious sense.<sup>2</sup>

113. **Nomination of a suitable third person by the person entitled to administer** is favored considerably in our present practice.<sup>3</sup>

114. **As to a judge of probate or a corporation**, objection may arise. A judge of probate would be an unsuitable person to receive the appointment from his own hands or within his own jurisdic-

<sup>1</sup> But here the court has more latitude of discretion. 3 Curt. 55; Wms. Exrs. 448; *Peters v. Public Administrator*, 1 Bradf. (Sur.) 200; *Bean v. Bumpus*, 22 Me. 549 (dispensing statute); (1896) P. 6 (small estate). See *post*, c. 6; 85 S. W. 1105, 114 Tenn. 289.

<sup>2</sup> *Arnold v. Sabin* 1 Cush 525. See conditional renunciation in *Rinehart v. Rinehart*, 27 N. J. Eq. 475; *McClellan's Appeal*, 16 Penn. St. 110. As to retracting a renunciation, see 62 N. Y. S. 819; 75 N. Y. S. 1058; *West v. Wilby*, 3 Phillim. 379; *Slay v. Beck*, 107 Md. 357, 88 A. 573; *Carpenter v. Jones*, 44 Md. 625; 74 Md. 238, 24 A. 155; *Kirtlan's Estate*, 16 Cal. 161; *Casey v. Gardiner*, 4 Bradf. (N. Y.) 13. Cf. 50.

The law will not sanction an agreement whose consideration is the relinquishment of the right to administration by one party to the other. *Bowers v. Bowers*, 26 Penn. St. 74, 67 Am. Dec. 398. Persons *sui juris* who voluntarily appear and participate in the proceedings, as shown by the record, cannot set up informality of citation against the judgment. 49 Neb. 8, 67 N. W. 858.

<sup>3</sup> But cf. local statutes. As to widow, see *Cobb v. Newcomb*, 19 Pick. 332; Litt. (Ky.) Sel. Cas. 49; *Georgetown College v. Browne*, 34 Md. 450; *Shiels, Re*, 120 Cal. 347, 52 P. 808. And see further, *Cresse, Matter of*, 28 N. J. Eq. 236; *Root, Re*, 1 Redf. 257; *Shropshire v. Withers*, 5 J. J. Marsh. 210 (widow with stranger); *Sheldon v. Wright*, 5 N. Y. 497. Even granting, as we must, that the court is not bound by the nomination made by a widow or the kindred first entitled to administer, yet the wishes and preferences of those having the greatest interest in preserving the estate are entitled to great weight. *McBeth v. Hunt*, 2 Strobb. (S. C.) 335; *McClellan's Appeal*, 16 Penn. St. 110. And hence the appointment, at the court's discretion, of any suitable person upon whom the next of kin entitled to the office, or a majority of them, may agree, is highly favored in American practice; the rights of more remote kindred, creditors and all strangers in interest being postponed to their expressed choice accordingly. *Wooten's Estate*, 41 A. 1000, 189 Penn. St. 71; *Raburn v. Bradshaw*, 52 S. E. 922, 124 Ga. 552; *Mandeville v. Mandeville*, 35 Ga. 243; *Munsey v. Webster*, 24 N. H. 126; *Halliday v. Du Bose*, 59 Ga. 268. So as to non-resident kindred. *Supra*, 109; *Smith v. Munroe*, 1 Ired. L. 345; 62 S. E. 202, 131 Ga. 283; *Cotter's Estate*, 54 Cal. 215; 93 Cal. 611, 29 P. 244. Cf. further, 2 Sw. & Tr. 139; Stat. 20 & 21 Vict. c. 77, § 73; 26 W. R. 439; 30 W. R. 231; *Chambers v. Bicknell*, 2 Hare, 536; *Hasinger's Appeal*, 10 Penn. St. 454. Nomination of non-resident not favored. *Supra*, 109; *Sargent, Re*, 62 Wis. 130, 22 N. W. 131; *Muersing, Re*, 103 Cal. 585, 37 P. 520. As to revoking such nomination, see *Shiels, Re*, 120 Cal. 347, 52 P. 808. As to nominee of guardians of a widow, there being no issue, see (1892) P. 50.

Inasmuch as the regular administration of estates, sometimes large and complicated, whether testate or intestate, is so highly favored at the present day, the selection of third persons of integrity, experience, and sagacity for such responsible duties must often be most desirable. And if a testator makes such a selection, or associates others with his next of kin or legatees in the trust, for reasons admittedly sound, there seems no good reason why the next of kin themselves, if the estate be intestate, should not exercise a corresponding discretion and nominate some trustworthy friend rather than forfeit all claim to administer by failing to qualify personally for the office.

tion; and delicacy, moreover, ought to prevent any judge from serving as administrator in an adjoining county, or at least where he might sometimes be called upon to hold a court.<sup>1</sup> In general, a corporation cannot lawfully administer unless the right is expressly conferred by its charter.<sup>2</sup>

**115. A creditor having a right of action against the deceased is usually the party entitled to administration on the intestate's estate, where the husband or widow and next of kin refuse or neglect to apply, or are incompetent.<sup>3</sup>**

**115a. If there is no husband, widow, next of kin, or creditor, willing and competent to the trust, administration may be granted**

<sup>1</sup> Legislation should keep local judges of probate from throwing estates and probate business into one another's hands. Probably, for a judge to appoint himself administrator would be void, as against public policy. As to appointing his own son, see *Plowman v. Henderson*, 59 Ala. 559; 79 Ala. 505. See further, *Sigourney v. Sibley*, 22 Pick. 507, 33 Am. Dec. 762; 61 Ala. 347.

<sup>2</sup> 76 Neb. 411, 107 N. W. 786; 33 Barb. 334. But such companies are now expressly chartered. See 34; *Goddard's Estate*, 94 N. Y. 544; *Mulhern v. Kennedy*, 48 S. E. 437, 120 Ga. 1080; 58 S. W. 755 (Tenn. Ch. App.); *Hunt's Goods*, (1896) P. 288; 110 N. W. 316, 76 Neb. 411.

<sup>3</sup> 4 Mass. 654; *Stebbins v. Palmer*, 1 Pick. 71, 11 Am. Dec. 146; *Curtis v. Williams*, 33 Ala. 570. As to nomination of a third person by creditors, see *Long v. Easley*, 13 Ala. 239. A relative who becomes sole creditor has a strong claim. *Lentz v. Pilert*, 60 Md. 296, 45 Am. Rep. 732. But a party claiming as trustee and not in his individual capacity, is not entitled as "largest creditor." 74 Md. 234, 21 A. 788. Nor is an officer of a corporation, where the latter is a creditor. 95 Ga. 383, 22 S. E. 611; 85 P. 277; 30 Utah, 351; 93 N. Y. S. 973. Note the expression of local code on this point: e.g., "principal creditor," "creditor first applying," etc. 18 Tex. 616; 2 Leigh, 267; *Ostendorff, Re*, 17 S. C. 22; *Sullivan's Estate*, 65 P. 793, 25 Wash. 430. English practice in this respect is founded in custom. *Wms. Exrs.* 440-442; 1 Phillim. 53; 43 L. T. 532. And see *Meekin v. Probate Judge*, 114 N. W. 241, 150 Mich. 354; 91 N. W. 162, 131 Mich. 314. Administration cannot in general be granted to a creditor or stranger until after the lapse of the time allowed for the application of the widow, next of kin, and others previously entitled and suitable, nor except upon their failure to pursue their rights, notwithstanding a due citation. 6 Mo. 563; *Haxall v. Lee*, 2 Leigh, 267; *Wms. Exrs.* 440, 441. Thirty days first allowed to widow and next of kin. *Munsey v. Webster*, 24 N. H. 126; *Cobb v. Newcomb*, 19 Pick. 336; 32 Neb. 480, 49 N. W. 427. Six months' delay. *Hill v. Alsbaugh*, 72 N. C. 402; 95 N. C. 353. And see *Davis v. Swearingen*, 56 Ala. 539; *Frick's Appeal*, 114 Penn. St. 29, 6 A. 363.

The reason why a creditor has usually been selected under such circumstances is in order that his claim may not be lost for want of administration upon the estate. *Elme v. Da Costa*, 1 Phillim. 177; 25 W. R. 698; 11 Mass. 256. He is a person in interest. Amount of one's claim not essential, except it be for preferring the principal creditor. *Arnold v. Sabin*, 1 Cush. 525. But it ought to be a claim which survives by law. 1 Pick. 71, 11 Am. Dec. 146; 4 Cush. 408. That the claim would be barred, if the statute of limitations were pleaded, is held no objection. *T. U. P. Charit.* (Ga.) 159; *Coombs v. Coombs*, L. R. 1 P. & D. 288. See further, *Wms. Exrs.* 442; *Aitkin v. Ford*, 3 Hagg. 193; 32 Neb. 480, 49 N. W. 427; 2 Phillim. 249. As to buying up a claim, etc., see 2 Hagg. 557; 3 Sw. & Tr. 181; 564; *Wms. Exrs.* 443; *Newcombe v. Beloe*, L. R. 1 P. & D. 314 (undertaker's claim); 35 L. J. P. M. & A. 60. Cf. 36 S. E. 908, 58 S. C. 469.

The creditor should, of course, be a suitable and competent person for the trust, as in other cases, and he should give security to administer ratably, or otherwise comply with the statute requirements as to qualifying for the office. Creditor may fail to respond when cited in. *Carpenter v. Jones*, 44 Md. 625.

to such other person as the court deems fit. Such has long been the English practice,<sup>1</sup> and statutes confirm or enlarge this judicial discretion both in England and the United States.<sup>2</sup>

116. **To commit administration to a designated public officer wherever those survivors are wanting** whose vigilance should protect distribution and the general interests of the dead person's estate is the wise policy of many American States. To a mere stranger the temptation in such a case would be to appropriate all to himself; debtors would of choice continue indebted; and even a creditor who administered in his partial interest might plunder the estate under pretext of asserting a legal claim. A probate court cannot readily keep vigilance over a miscellaneous throng of administrators watched by no private persons in interest, nor see that the security one has given remains good and ample. There may be urgent need of an immediate administration, notwithstanding the absence of a known husband, widow or kindred; these, if wanting at first, may present themselves afterwards; and, in final default of such priority, the State falls heir to the final balance of the estate. Hence, the modern creation of an office, known usually as that of public administrator.<sup>3</sup> A public administrator

<sup>1</sup> Wms. Exrs. 445; *Davis v. Chanter*, 14 Sim. 212.

<sup>2</sup> Mass. and other codes; *Thompson v. Hockett*, 2 Hill (S. C.) 347; Stat. 20 & 21 Vict. c. 77, § 73, cited, Wms. Exrs. 446, 447 ("special circumstances"). Distant kindred having no legal interest in the distribution may thus receive letters of administration; or an entire stranger in point of blood and interest. *Ib.* 1 Hagg. 692; 3 Sw. & Tr. 20. Cf. 101. Guardians or trustees are thus substituted. Bond, Goods of, L. T. 33 N. S. 71. See further, 21 Neb. 663, 33 N. W. 206; *Markland v. Albes*, 81 Ala. 433, 2 So. 123; 63 A. 806 (R. I. 1906); 107 N. W. 1004, 76 Neb. 28; 104 S. W. 732, 31 Ky. Law, 1059. But a stranger who has been hastily and without reason appointed has no status in court to object to the grant of letters to the suitable next of kin, nor to the revocation of his own letters. *Neidig's Estate*, 183 Penn. St. 492; *Carpenter v. Jones*, 44 Md. 625. Such appointment of a suitable person being discretionary with the judge, and the time having expired within which the next of kin or creditors might have appeared, the fact of their incompetency or unwillingness need not be alleged by the petitioner for appointment. 21 Neb. 663.

The expiration of a certain time for those having prior right bears upon this practice *Markland v. Albes*, 81 Ala. 433.

<sup>3</sup> The public administrator, receiving letters in any and all proper cases of intestacy, collects and preserves the estate, adjusts all claims upon it, charges it with such compensation for his service as the court may approve, corresponds with the non-resident or absent husband, widow, or next of kin, should such be found out, and finally distributes the residue according to law, turning it into the State treasury when the administration is completed, unless the rightful claimant has meantime taken the trust into his own charge or established a title to the surplus as distributee. Such an officer is subject to the double scrutiny of the probate court and the State Executive; creditors and all others in interest may always inquire into the sufficiency of his bonds; his accounts are regularly returned and recorded under special safeguards created by law against fraud, embezzlement, and concealment; while his general official bond, if such be furnished by him, dispenses with all necessity of finding special bondsmen for numerous petty estates, and so facilitates an economical settlement. The public

is usually permitted by the local statute to administer upon estate within his county of any decedent, regardless of the place of the latter's death or last residence.<sup>1</sup>

117. In English practice, when a foreigner dies intestate within the British dominions, administration appears to be granted to the persons entitled to the effects of the deceased according to the law of his own country, unless a question of British domicile is raised.<sup>2</sup> If the intestate was domiciled abroad or out of English jurisdiction, leaving assets in England, there should be an admin-

istrator performs the usual functions and is subject to the usual rules which pertain to ordinary administration; he holds, moreover, a public trust,—insignificant, perhaps, but honorable. He is, in a sense, representative and attorney of the presumed heir and distributee, namely, the State; and, more than this, he is charged with the concerns of all private persons interested in the estate, whoever and wherever they may be; winding up the affairs of the deceased on behalf of creditors and absent kindred according to their respective interests, if any such there be.

Public administrators are appointed in various States with peculiar functions prescribed by statute; as in Massachusetts, New York, Louisiana, Missouri, Illinois, and California; such administration being found chiefly useful at the large centres of wealth and population. The estates which reach their hands are usually too small to bear litigation, and require a prudent management, consisting at most of a few thousand dollars, and more frequently of a few hundred or less. See Mass. Pub. Stats., c. 131; Redf. Surr. Pract. (N. Y.) 175–180; *Union Mutual Life Ins. Co. v. Lewis*, 97 U. S. Supr. 682, 24 L. Ed. 1114; *McGuire v. Buckley*, 58 Ala. 120; 100 Cal. 78, 34 P. 521, 376; *McLaughlin, Re*, 103 Cal. 429, 37 P. 410. In some States a public administration may settle petty estates (e.g. under twenty dollars) by virtue of his official authority and without letters from the court. See Mass. Pub. Stats., c. 131; 77 S. W. 110, 102 Mo. App. 617; 80 P. 861, 146 Cal. 590; *Public Administrator v. Watts*, 1 Paige, 357; 4 Dem. 33; 1 Barb. Ch. 302; 5 Dem. 259; 1 Bradf. 100; *Ferrie v. Public Administrator*, 3 Bradf. 249 (preferred in cases of illegitimacy); 9 Mo. 784; *Johnston v. Tatum*, 20 Ga. 775. And see *Cleveland v. Quilty*, 128 Mass. 578; *Goddard's Estate*, 94 N. Y. 544 (trust company); 31 La. Ann. 555; 36 La. Ann. 535. A public administrator who takes out letters is a general administrator of the estate. 2 Dem. 630. Authority to settle estate after term expires. 24 Mont. 37, 60 P. 495.

<sup>1</sup> 52 P. 832, 120 Cal. 344; 95 S. W. 894, 198 Mo. 174, 115 Am. St. Rep. 472. See 34 S. E. 296. See further, 63 S. W. 678, 163 Mo. 510; 87 P. 17, 149 Cal. 485 (conflict in two separate counties); 98 N. W. 214, 120 Wis. 377; 95 S. W. 898, 198 Mo. 189 ("papers" as assets); *United States v. Tyndale*, 116 F. 820 (dead body floating on the high seas); 65 S. W. 130, 23 Ky. Law, 1287; 48 S. E. 699, 121 Ga. 111; 69 N. E. 909, 207 Ill. 385, 99 Am. St. Rep. 225. Cf. 108 Ill. 128, 444; 23 Ill. 484; 46 Cal. 573. Cf. 53 Cal. 243; 119 Cal. 663, 51 P. 1078; 3 Redf. (N. Y.) 91.

Under some codes the public administrator is preferred to any non-resident spouse or kindred; and such legislation is constitutional. *McWhirter's Estate*, 85 N. E. 918, 235 Ill. 607.

In various States the sheriff of the county or the clerk of the county courts is designated as virtual public administrator, and if no one else can be found competent or willing, may be even compelled to take the trust. *Johnson v. Tatum*, 20 Ga. 775; *Scarce v. Page*, 12 B. Mon. (Ky.) 311; 85 P. 1109; *Williamson v. Furbush*, 31 Ark. 539; *Hutcheson v. Priddy*, 12 Gratt. 85. A grant to the sheriff expires with his term of office. 71 Ala. 504, 46 Am. Rep. 347. As to commissioners of emigration, see 1 Bradf. (N. Y.) 259. And, outside of the city of New York, the county treasurers may exercise functions. *Ward, Re*, 1 Redf. (N. Y.) 254.

<sup>2</sup> Wms. Exrs. 429, 430; 1 Add. 340; 43 L. T. 532.

istration taken in England as well as in the country of domicile.<sup>1</sup> But in the case of a bastard, or of any other person dying intestate without leaving lawful kindred, husband or wife, the English sovereign is entitled to the surplus as last heir; and the English practice has been to transfer by letters patent the royal claim, with the reservation of a tenth part, whereupon the court usually grants letters of administration to the patentee as nominee of the crown.<sup>2</sup> Under the modern statute 15 Vict. c. 3, administration similar to that of a public administrator is recognized, though within narrow bounds.<sup>3</sup>

118. **The method of procuring letters of administration is quite similar to that pursued by executors** in obtaining letters testamentary, but dispensing with a probate.<sup>4</sup> The person claiming administration must apply by petition in writing to the probate court having jurisdiction of the case. Such petition is usually filed with the register or clerk in the first instance, whereupon a citation issues, unless the petitioner, by the written assent or renunciation of all others equal or prior in interest, can show an undoubted right to his immediate appointment; the citation, made returnable at a convenient court day, serves to notify all persons interested of the proceedings pending. At the hearing any person interested in the estate may appear and show cause for or against the appointment of the person named in the petition, who should on his part be prepared to show the facts essential to the grant of letters. One petitions for his own appointment and cites in others accordingly.<sup>5</sup> As a prerequisite to the grant of administration, a satisfactory bond, in modern practice, must usually be furnished by the

<sup>1</sup> Wms Exrs. 430; Attorney-General v. Bouwens, 4 M. & W. 193. See Stat. 24 & 25 Vict. c. 121, § 4, as to administration by foreign consul, under reciprocal treaties. See also, as to such treaty preference to public administrator, Wyman, *Re*, 77 N. E. 379, 191 Mass. 276, 114 Am. St. Rep. 601.

<sup>2</sup> Wms. Exrs. 433, 434; Dyke v. Walford, 5 Moore, P. C. 434; 2 Cas. temp. Lee, 394-397. A similar course appears to have been formerly pursued in case of forfeiture to the crown, as for treason, felony, or *felo de se*. By Stat. 33 & 34 Vict. c. 23, § 1, such forfeiture is abolished, and in this country it is not allowed.

<sup>3</sup> See Attorney-General v. Kohler, 9 H. L. Cas. 654; Wms. Exrs. 434, 435; 28 W. R. 278; Gosman, *Re*, 49 L. J. Ch. 590.

<sup>4</sup> 65, *supra*.

<sup>5</sup> 48 S. E. 40, 69 S. C. 43; Turner's Estate, 77 P. 1099, 142 Cal. 549 (various opposing petitions); 80 Law T. N. S. 295, 296; (1899) Prob. 59. The petition in American States is drawn up after a regular form approved by the court, and usually contained in a printed blank. In an original petition for general administration, it is proper to set forth the fact of the death of the person who deceased intestate, the time of the death, the place of last residence, the name and residence of the surviving spouse, if any, and the names, residences, and degree of kindred of his next of kin. If the next of kin are minors, this fact should be stated. Other grounds on which the petitioner bases his right to administer should be alleged; and local statutes will suggest what such statements should be, in the various cases of creditor, stranger, public administrator, etc., as well as in the various kinds of administration to be considered hereafter.



person selected for the trust; which bond having been approved and filed in the registry as the law directs, letters of administration issue to the person appointed, who may proceed forthwith in the execution of his trust unless an appeal is taken from the probate court.<sup>1</sup>

119. No one is *ex officio* administrator of a deceased person's estate; but the appointment must in each case be made and letters issued by the probate court before one can lawfully assume the rights and duties of the trust.<sup>2</sup> The proper evidence that one is an administrator is the letters of administration, or a certified copy thereof, under the seal of the court.<sup>3</sup>

120. Administration has been dispensed with in certain cases; as where all distributees of a deceased person, if they be of age,

As to informalities in the petition considered immaterial, see *Abel v. Love*, 17 Cal. 233; *Townsend v. Gordon*, 19 Cal. 188. A petition not made by a person interested as the statute requires should be dismissed. *Shipman v. Butterfield*, 47 Mich. 487. The English rule is that parties contesting the right to administration, before any grant, must proceed *pari passu* and propound their several interests. 1 Phillim. 459; *Wms. Exrs.* 425. But probate procedure is quite simple in most parts of the United States. The surrogate, ordinary, or judge (sometimes register) of the probate or orphans' court, whoever exercises jurisdiction in such matters, passes upon the petition in which citation was issued, and upon such adverse petitions besides as may be drawn up later to suit the occasion; making the appointment after a summary hearing of all persons interested. There is strictly neither plaintiff nor defendant; but, of applicants, some may withdraw and others come in at any time while the case is in progress. *Delorme v. Pease*, 19 Ga. 220. See *Weeks v. Sego*, 9 Ga. 199; 4 Harr. 73; 56 Ga. 146. When a petitioner for administration withdraws his petition in the probate court, he ceases to be a party to the record. *Miller v. Keith*, 26 Miss. 166. If contest arises as to the essential facts, such as pedigree, the case may be adjourned from time to time; and witnesses are summoned or a commission issued to take depositions as convenience may require. See *Ferrie v. Public Administrator*, 3 Bradf. 151. Affidavits, which in probate proceedings are much used, precede the grant of administration both in England and American States. See *Wms. Exrs.* 454; *Torrance v. McDougald*, 12 Ga. 526; *Gillett v. Needham*, 37 Mich. 143.

<sup>1</sup> As to probate bonds, etc., see c. 5, *post*. In case of certain officials for public administration a general bond is often given. See 15 Ala. 346; 41 Ala. 292. A grant of administration is *prima facie* evidence of all precedent facts essential to jurisdiction. *Davis v. Swearingen*, 56 Ala. 31. See further, *Witsel v. Pierce*, 22 Ga. 112; *Wms. Exrs.* 452; 9 Ga. 135; 67 Iowa, 316; 2 Dev. L. 360; *Tucker v. Harris*, 13 Ga. 1, 58 Am. Dec. 488; 3 Mo. 35; *Davis v. Stevens*, 10 La. Ann. 496; *Pleasants v. Dunkin*, 47 Tex. 343. Administration should never be granted by parol, but entered as of judicial record, and preserved at the registry of probate where the bond and other papers relative to the case are kept; letters duly authenticated under the seal of the court being furnished to the qualified administrator, and certificates of the appointment supplied by the register, from time to time as occasion may require. *Wms. Exrs.* 452. The rule is to date decree, letters and bond on the same day. See as to formal matters, 26 La. Ann. 329; 85 N. C. 258; *Grande v. Herrera*, 15 Tex. 533; *Sharpe v. Dye*, 64 Cal. 9, 27 P. 789.

<sup>2</sup> This general rule applies to a sheriff, coroner, police officer, or whoever else may come into the charge and temporary custody of the effects of a deceased person; and, subject to statute qualifications already noted, the same holds true of public administrators. *Wilson v. Dibble*, 16 Fla. 782; *Williamson v. Furbush*, 31 Ark. 539; *supra*, 117; 34 Cal. 464; *Thomas v. Adams*, 10 Ill. 319.

<sup>3</sup> *Davis v. Shuler*, 14 Fla. 438; *Albright v. Cobb*, 30 Mich. 355; 10 La. Ann. 496; *Tuck v. Boone*, 8 Gill, 187; *Moreland v. Lawrence*, 23 Minn. 84; *McNair v. Dodge*, 7 Mo. 479.

settle and pay the debts of the estate, and divide the property fairly among themselves, without the intervention of an administrator; for in such a case the rights of no one are prejudiced.<sup>1</sup> Such settlement and division would not, usually, be in strict compliance with the law, and, if made unfairly, or in disregard of the rights of some party in interest, it might be avoided afterwards through the intervention of a legal administrator.<sup>2</sup> Other instances are found where courts disincline to appoint an administrator unnecessarily, or to permit one already appointed to overthrow the reasonable transactions of distributees with reference to the estate, for the mere sake of asserting his own lawful authority.<sup>3</sup> Statutes specially dispense with letters of administration in various instances; and particularly where the balance of pay due some public servant is to be settled by government.<sup>4</sup>

<sup>1</sup> *Taylor v. Phillips*, 30 Vt. 238; 32 Vt. 437; *Henderson v. Clarke*, 27 Miss. 436; *Needham v. Gillett*, 39 Mich. 574; 118 N. W. 43 (Iowa); 106 N. W. 354, 130 Iowa, 132; 94 P. 155, 77 Kansas, 97; 42 So. 776, 118 La. 206; *Welch's Succession*, 36 La. Ann. 702.

<sup>2</sup> *Hibbard v. Kent*, 15 N. H. 516; 31 N. H. 393.

<sup>3</sup> See as to equity, *Fretwell v. McLemore*, 52 Ala. 124; 94 Ala. 479, 10 So. 319; 45 S. C. 17, 22 S. E. 750. An administrator should not reopen previous transactions where he can proceed both prudently and with delicacy by charging off the proceeds to spouse and kindred in his accounts. See *Walworth v. Abel*, 52 Penn. St. 370. And see 84 N. E. 58, 233 Ill. 19.

Lapse of time favors in such cases. See 84 P. 646 (Wash. 1906); 76 Mich. 661. Administration is granted on an estate because there is some occasion for such a grant; and where there is no occasion, no substantial object to be gained by the issue of letters, the grant should be withheld. *Graves's Succession*, 50 La. Ann. 435, 23 So. 738; 82 Md. 383, 33 A. 633; *People v. Abbott*, 105 Ill. 588; *Fort v. Pitts*, 66 Tex. 593, 1 S. W. 563. Partial intestacy under a will affords no occasion for granting administration. See 250.

Yet next of kin who have intermeddled and divided may be held answerable afterwards to an administrator, legally appointed if justice requires. 4 Ired. 14; 5 Jones Eq. 410; 6 Geo. 443; 4 Watts, 134. And see *Weeks v. Jewett*, 45 N. H. 540.

<sup>4</sup> For the public interest is often thought to be best subserved in such cases by dealing directly with widows, orphans, and other next of kin, through the Executive; to the utter exclusion, if need be, of the intestate's creditors, and the avoidance of controversies in probate court over the *locus* of assets or of the decedent's last domicile. For English statutes concerning administration of the effects of intestate seamen, marines, and soldiers, see *Wms. Exrs.* 455-460. United States army and navy acts make frequent provisions for a peculiar distribution and settlement through the auditors of the treasury, as to back pay, prize money, etc.

Yet, in general, subject to convenient rules of limitation as to time, administration is desirable for the settlement of intestate estates among the people, not trivial in amount. Nor does American policy so much dispense with the credentials and formality as it renders the judicial procedure simple and inexpensive as far as possible. The custody of the law must in this instance be regarded as a custody for the benefit of all parties interested. See *Bartlett v. Hyde*, 3 Mo. 490; *Alexander v. Barfield*, 6 Tex. 400; 11 Ala. 609; 7 Ired. Eq. 272; *Bowdoin v. Holland*, 10 Cush. 17; 18 Tex. 652; *Marshall v. King*, 24 Miss. 85. There may be statute limitations as to amount or time. *Ante*, 93, 94. An infant may die entitled to property in his own right, so that administration becomes requisite. 11 Ala. 609; *Wheeler v. St. Joseph R.*, 31 Kan. 640, 3 P. 297; 150 Mass. 234, 22 N. E. 915. And as to married woman with a separate estate, see *Holmes v. Holmes*, 28 Vt. 765; 8 Ired. Eq. 52; *supra*, 98; *Wilkinson v. Robertson*, 85 Md. 447, 37 A. 208.

## CHAPTER IV.

## APPOINTMENT OF ADMINISTRATORS NOT ORIGINAL AND GENERAL.

121. Since administration is not always original and general, there remain several kinds of administration, all of a special and limited nature, to be stated, and all fully recognized in probate practice, English and American. These may be enumerated in order, as chiefly: (1) administration with the will annexed (*cum testamento annexo*); (2) administration of personalty not already administered (*de bonis non*); (3) temporary administration, as, for instance, during minority (*durante minore etate*); (4) and special administration for limited and special purposes (*ad colligendum*, etc.).

122. (1) As concerns administration with the will annexed, administration should be granted of testate estates in various instances; as where the decedent omitted in his will to name an executor, or where the executor or executors named are all found dead or incompetent to act when the will is to be presented for probate, or where the executor refuses the trust, or has disappeared, or neglects to appear and qualify as the statute directs. Here the court must grant an administration, while giving the will its due operation as far as possible, and admitting it to probate; and this sort of grant is known as administration with the will annexed.<sup>1</sup>

<sup>1</sup> See 2 Inst.; Wms. Exrs. 461; Peebles v. Watts, 9 Dana (Ky.) 102, 33 Am. Dec. 531; Vick v. Vicksburg, 2 Miss. 379, 31 Am. Dec. 167; Tuttle v. Turner, 8 Jones L. 403; Crawshaw's Goods, (1893) P. 108. For a limited grant of administration under a will, see Butler's Goods, (1898) P. 9.

The will should, of course, be presented for probate, even though there be no executor to serve under it; and, in default of an executor, the person applying to be appointed administrator with the will annexed takes usually the burden of probate, petitioning after the same form as an executor, but alleging the special circumstances, besides, under which he claims the appointment. Letters of administration with the will annexed should not be granted unless the exigency is made apparent; executors, if alive and competent, should have full opportunity to take or renounce the trust; any renunciation on their part should be made in proper form; and if, out of several executors named, one is willing and competent to serve, such administration is not to be granted. Wms. Exrs. 281, 283, 461; Stebbins v. Lathrop, 4 Pick. 33; Maxwell. Re, 3 N. J. Eq. 611; *supra*, 44; Springs v. Irwin, 6 Ired. L. 27. See Ponsonby's Goods, (1895) P. 287, as to an executor sick at the time; 134 *post*. Cf. Cox v. Cox, 16 Miss. 292 (non-resident). Wms. Exrs. 337; 2 Cas. temp. Lee, 241. Pending an appeal from probate of the will, a petition for such administration cannot be allowed. Fisher. Re, 15 Wis. 511.

123. **The functions of administrator with the will annexed are,** in general, those of executor; for the probate court makes him pilot by substitution, to steer like an executor by the chart which the deceased has left behind. His letters are worded to fit the case; but he qualifies substantially as an administrator.<sup>1</sup> A will is not vitiated by the failure of executors to carry out its provisions; and the full appointment of an administrator with the will annexed assumes, though not perhaps conclusively, that the court has in point of fact, admitted the will to probate.<sup>2</sup>

124. **The rule, when uncontrolled by statute, is to grant administration with the will annexed to the claimant having the greatest interest under the will;** for which reason the residuary legatee is preferred to mere next of kin.<sup>3</sup> He is preferred, not only to next of kin, but to all other legatees under the will besides; and if he die after the testator, and before obtaining letters, his personal representative takes precedence in his right to the fullest extent.<sup>4</sup>

125. **If the residuary legatee is also next of kin** (saving the rights of husband or widow surviving) practice and statute have been held to unite in his favor, so that the court cannot pass him over.<sup>5</sup> Upon the refusal or inability of the residuary legatee to fill the vacancy under the will, administration with the will annexed has been granted most commonly to the next of kin; though the English practice is to refuse such administration where the next

<sup>1</sup> Wms. Exrs. 470; next c. By the better practice, the judicial record should show that there was cause for granting such administration. But see 9 Dana, 202. See also *Giessen v. Bridgford*, 83 N. Y. 348.

<sup>2</sup> *Lackland v. Stevenson*, 54 Mo. 108.

<sup>3</sup> See Wms. Exrs. 463, 464; *Atkinson v. Barnard*, 2 Phillim. 318. Of two or more residuary legatees, any of them may be taken as the court may see fit to select. *Taylor v. Shore*, 2 Jones, 162; Wms. Exrs. 467. See 5 Dem. (N. Y.) 128; 4 Dem. 168; 5 Dem. (N. Y.) 281. Under the New York statute, such letters must be issued to the guardian of any infant who, but for his infancy, would be entitled to them. 4 Dem. 297. And though the estate be such that the residuary legatee is not likely to have a residue, or by the terms of the will must hold that residue with limitations, the presumption of the testator's favor upholds his claim, nevertheless, to be appointed. *Hutchinson v. Lambert*, 3 Add. 27; *Atkinson v. Barnard*, 2 Phillim. 316; *Mallory's Appeal*, 62 Conn. 218, 25 A. 109 (administration *de bonis non*). But where one is made a mere trustee of the residue it is otherwise. *Ditchfield's Goods*, L. R. 2 P. & D. 152. Where a residuary legacy is given to a trustee to be paid over, the *cestui que trust*, not the trustee, should be appointed. *Thompson's Estate*, 33 Barb. 334; 5 Dem. 523.

<sup>4</sup> Wms. Exrs. 464, 465; 3 Phillim. 635; *Wetdrill v. Wright*, 2 Phillim. 243; *Booraem's Estate*, 55 N. J. Eq. 759, 37 A. 727. In *M'Auliffe's Goods*, (1895) P. 290, a convent was residuary legatee, and letters were granted to the Mother Superior. Cf. 88 N. Y. S. 557; 87 N. Y. S. 1115. If one is not only sole residuary legatee but sole beneficiary under the will, still stronger becomes his claim for appointment where an executor is wanting. *Crawshaw's Goods*, (1893) P. 108. And see *Campion's Goods*, (1900) P. 13 (grant to assignees of the residuary legatee).

<sup>5</sup> Cas. temp. Lee, 414; Wms. Exrs. 465.

of kin takes under the will no beneficial interest.<sup>1</sup> Administration may be granted to next of kin where the will contains no clear disposition of the residue.<sup>2</sup>

126. **Where a wife makes a lawful will, but appoints no executor, or names one without any right to do so, her surviving husband's right has been variously construed; but it would appear that the grant of letters is discretionary in the court according to the circumstances.<sup>3</sup> What has been said of the widow's general right to administer on the estate of her deceased husband may suffice for establishing her precedence over the next of kin, or statute equality with them, wherever occasion arises for granting administration with the will annexed, of such estate.<sup>4</sup>**

127. **If there be an executor living and competent, his paramount rights must be respected. And any order of court which grants administration with the will annexed to another before the executor has formally renounced the trust is voidable upon his application made in due time.<sup>5</sup> Logically speaking, an executor ought not to be allowed to take out administration with the will annexed, but there are cases in which an individual may be considered entitled to such grant, after renouncing the claim of executor.<sup>6</sup>**

128. (2) **The general principle of administration *de bonis non* is that this grant shall be made where a vacancy must be filled by the court while the estate remains incompletely settled. Hence the grant is made under either of two aspects: (1) where there was a**

<sup>1</sup> Wms. Exrs. 466; *Kooystra v. Buyakes*, 3 Phillim. 531.

<sup>2</sup> *Aston, Goods of*, L. R. 6 P. D. 203. The next of kin has a preference over any creditor. *Little v. Berry*, 94 N. C. 433. The case of non-resident testator who leaves local property is not within the statute. 49 Conn. 411. See further, 1 Dem. (N. Y.) 240; 62 A. 556.

<sup>3</sup> See *Brenchley v. Lynd*, 2 Robert. 441; 2 Sw. & Tr. 135; 4 Hagg. 386. On the whole, the husband's right to administer is favored in England and the United States, save so far as the wife may have lawfully controlled it by her own testamentary disposition. Wms. Exrs. 415, 416; *supra*, 98; Book I, Part II, c. 3. See (1894) P. 23, where husband had deserted and disappeared.

<sup>4</sup> *Supra*, 99; Wms. Exrs. 463, n.; 7 Notes of Cas. 684 ("during widowhood"). Where under the will the largest or the residuary beneficiary is the surviving spouse, all the greater becomes the right to be appointed. See *Alston's Goods*, (1892) P. 142, where both husband and wife perished together in a shipwreck, after having made corresponding wills in one another's favor.

<sup>5</sup> *Baldwin v. Buford*, 4 Yerg. 16; *Thompson v. Meek*, 7 Leigh, 419. Cf. Wms. Exrs. 284; Add. 273.

<sup>6</sup> E.g. *Murphy v. Murphy*, 24 Mo. 526 (an attesting witness); *Blisset's Goods*, 44 L. T. 816; *Briscoe v. Wickliffe*, 6 Dana, 157.

Administration with will annexed is granted sometimes to attorney of non-resident executor. See 109; Wms. Exrs. 468.

will, or (2) where there was no will.<sup>1</sup> Where the sole executor, whose functions cease, has not completed the administration of the estate, where he has not paid all the legacies, satisfied all the lawful claims, and delivered over the balance in his hands to the persons entitled thereto, an administrator *de bonis non* with the will annexed may be rightfully appointed.<sup>2</sup> So, correspondingly, is it with the administration of an intestate estate.<sup>3</sup>

<sup>1</sup> Failing the original office, therefore, under a will, administration *de bonis non* with the will annexed is proper; but failing the original office, where there was no will, administration *de bonis non* simply. In modern practice, to render any grant *de bonis non* valid, the original office must be vacant at the time by the death, resignation, or removal of the sole remaining executor or original administrator. See *Rambo v. Wyatt*, 32 Ala. 363, 70 Am. Dec. 544; *Wms. Exrs.* 471; *Creath v. Brent*, 3 Dana, 129. And as to attacking decree, see 103 Ind. 223, 2 N. E. 601; 70 Ala. 140. Under some statutes, administration *de bonis non* (with or without the will annexed, as the case may be) is proper whenever an unmarried woman, being sole executor or administrator, marries; the trust terminating accordingly, instead of vesting in her husband, as under the old law. *Supra*, 32, 107. And see L. R. 1 P. & D. 637.

<sup>2</sup> *Alexander v. Stewart*, 8 Gill & J. 226; 1 Root (Conn.) 174; *Chamberlin, Re*, 70 Conn. 363, 39 A. 734; *Mass. Gen. Stats.* c. 101, § 1. Cf. *supra*, 40, 43; *Hart v. Smith*, 20 Fla. 58; (1896) P. 129. No such successor in the trust as to sell lands under power given by will. *Albright v. Bangs*, 83 P. 1030, 72 Kan. 435, 115 Am. St. Rep. 219; 83 N. E. 526, 78 Ohio St. 271 (bond as residuary legatee).

<sup>3</sup> If a sole administrator dies before completing the trust committed to him, or is removed by the court or resigns, administration *de bonis non* will be granted, provided there is personal property left unadministered or debts remaining due from the estate. *Scott v. Fox*, 14 Md. 388; *Hendricks v. Snodgrass*, 1 Miss. 86; *Chapin v. Hastings*, 2 Pick. 361; *Wms. Exrs.* 474.

Statute restrictions are imposed, however, on this grant; e.g., as to amount of estate left. This is for the purpose evidently of checking litigious proceedings, and dispensing with multiplied offices for trifling estates. See 77 S. W. 105, 103 Mo. App. 281; 67 S. W. 989, 24 Ky. Law, 31. Administration *de bonis non* is often granted with the view of overhauling the acts and conduct of some predecessor, and making him, his bondsmen, and his personal representatives answerable to dissatisfied parties in interest. If the trust has been essentially fulfilled under the original grant, it is thought better to suffer the administration to expire. See further (lapse of time, etc.) 92 S. W. 763, 116 Tenn. 122; *Bancroft v. Andrews*, 6 Cush. 493; *Holmes, In re*, 33 Me. 577; 14 Tex. 62; *San Roman v. Watson*, 54 Tex. 254. Protection of the rights of distributees may give occasion for the appointment. *Scott v. Crews*, 72 Mo. 261; 72 Mo. 270; *Neal v. Charlton*, 52 Md. 495; 70 Conn. 363, 39 A. 734; 4 Dev. & B. L. 139; 26 Md. 312; 6 Gratt. 475; *Hinton v. Bland*, 81 Va. 588, 595; *Merkle v. Bennett*, 68 Mich. 133, 35 N. W. 846; 25 Fla. 980, 7 So. 163 (to perfect some one's title to assets).

As with co-executors, however, so in joint administration, the survivor becomes sole administrator, and the original office does not lapse so long as one remains to fill it. *Wms. Exrs.* 474; 2 Vern. 514; 62 Tex. 54. See 131 U. S. 315, 33 L. Ed. 170. Where second administration without this restriction (*de bonis non*), the Court's error in appointment calls for direct and not collateral attack, even though no vacancy appears of record. *Sands v. Hickey*, 33 So. 827, 135 Ala. 322. And see 32 So. 1009, 134 Ala. 646, 92 Am. St. Rep. 48.

Where the county court of competent jurisdiction in a State has granted probate and letters testamentary, or administration of an estate, the same court has jurisdiction to grant administration *de bonis non*. *Lyons, Ex parte*, 2 Leigh, 761. Cf. 24 Ark. 111; 3 Dana, 129; *Hooper v. Scarborough*, 57 Ala. 510; *Watkins v. Adams*, 32 Miss. 333 (statute); c. 6, *post*, as to removal from office, resignation, etc. And the American doctrine is that the administrator *de bonis non* derives his title from the deceased, and not from his predecessor in office. *Foreign Missions, In re*, 27 Conn. 344. See Donald-

129. *Administration de bonis non* is usually committed according to the rules already laid down concerning the original grant of letters. Thus, for administration *de bonis non* with the will annexed, administration with the will annexed furnishes the criterion of preference.<sup>1</sup> And for administration *de bonis non* on an intestate estate, the ecclesiastical rule, sanctioned likewise by courts of common law, has been that there is no distinction in the choice between this and original administration.<sup>2</sup> But while these rules prevail in England, they differ in the United States.<sup>3</sup>

130. As to the death of a surviving spouse pending settlement of a deceased spouse's estate, the rule has varied.<sup>4</sup>

131. Letters of administration *de bonis non* issue in due form as in other cases;<sup>5</sup> following, however, the peculiar style appropriate to the grant; and the probate record or judicial order makes due reference to the former grant and the manner of its termination. The administrator thus appointed makes oath and qualifies after

son v. Raborg, 26 Md. 312. Such administration may be proper where the executor has advanced for debts and distribution from his own funds, but has not had an opportunity to reimburse himself. Munroe v. Holmes, 13 Allen, 109. Cf. 77 N. E. 630, 190 Mass. 336. Or because of debts reported desperate by the former representative, which prove later collectible. 62 Conn. 218, 25 A. 109. Real estate may sometimes furnish occasion for the grant. Cushman v. Albee, 66 N. E. 590, 183 Mass. 108.

<sup>1</sup> Wms. Exrs. 472; 124.

<sup>2</sup> Wms. Exrs. 474, 475; 2 Hagg. Appendix, 169, 170. See 97-111.

<sup>3</sup> See as to precedence, Long v. Easley, 13 Ala. 239; Kearney v. Turner, 28 Md. 408; Pendleton v. Pendleton, 14 Miss. 448; Cutlar v. Quince, 2 Hayw. (N. C.) 60. Statutes affect the local rule. Bradley v. Bradley, 3 Redf. (N. Y.) 512; 37 Barb. 192, Russell v. Hoar, 3 Met. (Mass.) 187.

The grant of administration *de bonis non* regards, according to the better reasoning, the interest of the original estate, rather than of those representing the original appointee, whose management, indeed, may require a close investigation, after his death, removal, or resignation; and hence it seems better still that the court should have power to appoint at discretion some third person committed to neither interest, but impartial between them, as well as energetic and prudent. See L. R. 1 P. & D. 450, 459 (a joint grant), 538. So, too, in determining here the right of kindred to administer, the *status* at the death of the person who left the estate, and not the *status* at the time the trust became vacant, should be regarded; for thus does the appointment go by the beneficial interest. Wms. Exrs. 475, 476; 1 Cas. temp. Lee, 179.

<sup>4</sup> Schoul. Hus. & Wife, § 415; Wms. Exrs. 412-414; Squibb v. Wyn, 1 P. Wms. 378. But the more rational rule has at length been established, both in England and the United States, that administration on the wife's estate shall be granted, in case of the husband's death pending its settlement, to the husband's representatives; unless indeed (as under a marriage settlement or some peculiar statute) the wife's next of kin are entitled to the beneficial interest; the grant in either case following the interest. Fielder v. Hanger, 3 Hagg. 769; 3 H. & C. 193; 4 Munf. 231; 6 Johns. 12; Bryan v. Rooks, 25 Ga. 622, 71 Am. Dec. 194; 3 Redf. (N. Y.) 214; Patterson v. High, 8 Ired. Eq. 52. As to the corresponding case of a deceased husband a corresponding rule seems proper. Cutchin v. Wilkinson, 1 Call (Va.) 1.

<sup>5</sup> Citation not indispensable where local statute leaves court to an unfettered choice. Sivley v. Summers, 57 Miss. 512. Cf. Wms. Exrs. 477, 478; 112 *supra*.

the manner of a general administrator, *mutatis mutandis*.<sup>1</sup> This sort of administration is usually to be regarded as a general grant; but under exceptional circumstances it may be limited.<sup>2</sup>

132. (3) **As to temporary administration**, this is of a limited or circumscribed character, in being confined to a particular extent of time, though the administrator has the powers of an ordinary administrator for the time being. To this class belongs what is known as administration during minority. Administration during minority (*durante minore ætate*) may be granted where the person who was constituted sole executor under a will, or who has the right of precedence to administer an intestate estate, is under age, and therefore legally incapable of serving for the time being. In the one instance, administration during minority with the will annexed may be properly committed to another; in the other, administration simply, with the like qualification.<sup>3</sup>

133. **Another temporary administration limited *durante absentia***, or while the sole executor named in the will was out of the kingdom, has been granted in English practice prior to probate; and so, too, where the next of kin was abroad, and letters of ordinary administration had not been granted.<sup>4</sup> Similar grants are found in our earlier American practice.<sup>5</sup> But the more usual course in the United States is now for the court to appoint some one the general administrator of the estate, either with or without the will annexed, according as one may have died testate or intestate, treating this official as the general and responsible representative of the estate;

<sup>1</sup> See *Wms. Exrs.* 478, 479; *Veach v. Rice*, 131 U. S. 293.

<sup>2</sup> See *Hammond's Goods*, L. R. 6 P. D. 104. So American statutes provide, too, where this administration is taken out after twenty years, as to property, etc., ascertained afterwards. *Mass. Pub. Stats.* c. 101.

<sup>3</sup> English practice deals with this administration more fully than American. *Wms. Exrs.* 479-495; *Cope v. Cope*, L. R. 16 Ch. D. 49. But it is recognized more or less clearly in parts of the United States, where, however, the local policy is to avoid such grants as much as possible. *Pitcher v. Armat*, 6 Miss. 288; *Ellmaker's Estate*, 4 Watts, 34; *Taylor v. Barron*, 35 N. H. 484, 493, *per* Bell, J.; *Wallis v. Wallis*, 1 Wins. (N. C.) 78. Cf. local statutes. If there are several executors, and one of them is of full age and capacity, administration during minority need not be granted, because the person of full age may serve, notwithstanding the nonage of others, and so such administration may cease as to all under age where any one reaches majority. *Wms. Exrs.* 479. See *Cartwright's Case*, 1 Freem. 258; *Mass. Gen. Stats.* c. 93, § 7. As to discretionary appointment by the court, etc., see local statute; *Wms. Exrs.* 481, 482, and cases cited; 1 Hagg. 381; *Stewart's Goods*, L. R. 3 P. & M. 244; *Burchmore, Goods of*, L. R. 3 P. & D. 139.

An administrator *durante minore ætate* has the functions of an ordinary administrator so long as his authority lasts. *Cope v. Cope*, L. R. 16 Ch. D. 49; *Wms. Exrs.* 553, 554. See *Stat. 38 Geo. III*, c. 87, cited *ib.* 485.

<sup>4</sup> *Wms. Exrs.* 502-512; 1 *Lutw.* 342; s. c. cited in 2 P. *Wms.* 579. See 2 *Ld. Raym.* 1071.

<sup>5</sup> *Willing v. Perot*, 5 *Rawle*, 264.



the case admitting, perhaps, of what we term a special administration, if the emergency be pressing and likely to be temporary only; while here the rights of next of kin, as such, to dictate administration, are more lightly weighed than in England, under all circumstances.<sup>1</sup>

134. **Another temporary administration is administration *pendente lite***; limited both in time and purpose. English probate practice allowed this where controversy arose touching the right of administration, and afterwards equally permitted the grant in contests over the probate of wills and letters of executorship.<sup>2</sup> Administration *pendente lite* is recognized in parts of the United States under various qualifications; though statutes of more extensive scope are found to include this case under what is rather to be termed special administration.<sup>3</sup>

See 135, *post*, as to special administration. Various local statutes may be found to meet the case of non-residence or absence. Prolonged absence, detrimental to the interests of an estate, and involving negligence, might present a case perhaps for removal from office in some States. See *Morris v. Bienvenu*, 30 La. Ann. 878; 27 La. Ann. 129.

Lord Holt in *Slater v. May*, 2 Ld. Raym. 1071, likens the situation to that of *durante minore etate*. But see *Webb v. Kirby*, 3 Sm. & G. 333.

Administration *durante absentia* was formerly available only where original letters testamentary or of administration had not issued; and it was for the preliminary convenience of the estate alone. When probate had once been granted, and the executor afterwards went abroad, the courts would not grant new administration. *Griffith v. Frazier*, 8 Cranch, 9; 2 P. Wms. 579. This produced inconvenience; for, while a power of attorney might answer all ordinary purposes on the absentee's behalf, there are special cases where the demand for a personal representative within the jurisdiction is indispensable. Hence modern statutes extend the scope of such appointments. Wms. Exrs. 503-509, citing these statutes and numerous decisions; Act, 38 Geo. III, c. 87; Act, 20 & 21 Vict. c. 77, § 74 (1857); Act, 21 & 22 Vict. c. 95, § 18. See *Ruddy's Goods*, L. R. 2 P. & D. 330; 28 W. R. 431; 35 L. T. 767; (1897) P. 82.

<sup>2</sup> See Wms. Exrs. 496-501, and cases cited *passim*; Moore, 636; *Walker v. Woolaston*, 2 P. Wms. 589; Acts, 20 & 21 Vict. c. 77, and 21 & 22 Vict. c. 95. Administrators *pendente lite* are virtually appointees of the probate court, corresponding nearly to receivers in chancery, so far as the occasion for an appointment may be regarded, and they are assumed to be indifferent between the contending parties. Wms. Exrs. 496; *Mortimer v. Paull*, 2 P. & D. 85. Such appointments are only for emergency, and mutual consent of contending parties to the party selected is desirable.

<sup>3</sup> See 135, *post*; *Lamb v. Helm*, 56 Mo. 420; *Crozier v. Goodwin*, 1 Lea, 368; *Wade v. Bridges*, 24 Ark. 569; *Todd v. Wright*, 12 Heisk. 442; *Fisk v. Norvell*, 9 Tex. 13, 58 Am. Dec. 128; *Slade v. Washburn*, 3 Ired. L. 557. See further, Wms. Exrs. 496, 497; L. R. 2 P. & D. 147; *Tichborne v. Tichborne*, L. R. 2 P. & D. 41. Local statutes should here be consulted both as to appointment and the powers of such appointee. *Kaminer v. Hope*, 9 S. C. 253; *Baldwin v. Mitchell*, 86 Md. 379, 38 A. 775; 54 N. J. Eq. 638, 35 A. 643; (1897) 1 Ch. 866 (may be sued by creditor of estate). The authority of an administrator *pendente lite* ceases with the suit. *Cole v. Wooden*, 18 N. J. L. 15; *Wieland v. Bird*, (1894) P. 262.

The old books suggest other occasions for requiring a limited administration as to time. Godolph. pt. 2, c. 30, § 5; Wms. Exrs. 513. Administration limited until a will left in a distant land, or missing and requiring long search or delay, could be found and presented for probate, has been granted in various modern English cases, agree-

135. **Special administration for limited and special purposes,** and for various possible emergencies becomes distinguished from a full or general appointment as executor or administrator under our American codes.<sup>1</sup>

ably to the peculiar state of facts presented and the urgency of an immediate appointment. Metcalfe's Goods, 1 Add. 343; 2 Hagg. 555; 2 Add. 351; (1893) P. 21. Administration, too, appears by the English rule to be well granted where a sole executor or administrator becomes temporarily ill or insane and incapable of discharging his official functions. Phillips, Goods of, 2 Add. 336; Wms. Exrs. 518; Ponsonby's Goods, (1895) P. 287; Evelyn, *Ex parte*, 2 M. & K. 4. And see 2 Add. 348, 351, note; 1 Hagg. 93; 2 Sw. & Tr. 614; 2 Hagg. 62; Somerset's Goods, L. R. 1 P. & D. 350; Wms. Exrs. 520-528. See further, temporary administration for closing out some transaction of importance to the estate. 24 W. R. 298; Bolton's Goods, (1899) P. 186; (1894) P. 262.

The result of such investigation should be to discourage any specific enumeration of limited or special administrations of various kinds, as at English law; whose real force and effect, it is not always easy to define. The vital elements in all such grants are two: limitation of time, and limitation of purpose; and these limitations frequently, but not always, subsist together.

<sup>1</sup>See local code. Such special administrator, or "collector," should not be directed to pay debts, legacies or distributive shares, save so far as the local statute may authorize. 2 Dem. 292; 3 Redf. (N. Y.) 165; Kaminer v. Hope, 9 S. C. 253; Ellmaker's Estate, 4 Watts, 34. But as to *durante minore aetate*, which is full for a definite or definable temporary period, see 133, *supra*; Lamb v. Helm, 56 Mo. 420.

In America special administration is temporary by inference, because wholly superseded by the grant of general administration or letters testamentary; and it is limited in scope to the necessities of the situation. Legislation defines this scope; and special administration thus becomes a clearly understood grant, well adapted to the various exigencies likely to arise for invoking it. Its chief purpose is *ad colligendum*, or rather the collection and preservation of the decedent's effects; and the statute which creates the office explains sufficiently its purpose and incidents.

Such an administration may readily be shaped by the legislature to meet the usual exigencies of a temporary appointment for limited purposes; thereby dispensing with the cumbrous classification of administration *pendente lite*, *durante absentia*, and so on.

In various States express provision is made for this special or temporary administrator who shall collect and preserve the estate for the permanent and general appointee. A disinterested person, not a litigant, is to be selected; nor are the rights of widow and next of kin, or legatees, so strictly regarded in the choice as they would be in a general administration; but rather the sound discretion of the court, aided by the common consent and confidence of litigants and all who may be interested in the permanent appointment, directs the selection. See 82 P. 688, 1 Cal. App. 482; 96 N. Y. S. 772; Breeding v. Breeding, 30 So. 881, 128 Ala. 412; 87 N. Y. S. 793; Hartley v. Lord, 80 P. 554, 38 Wash. 432 (not an executor). Furthermore, it is the general rule that this officer may be removed or superseded in his functions by the court, and that his powers shall cease whenever general letters testamentary or of administration are granted, and due qualification follows, whether general letters be original or *de bonis non*: but that meantime, being an officer of the court, as it were, litigant parties cannot obstruct the exercise of his functions nor hinder him by frivolous appeals from the judge. For a trust must not be kept in abeyance which the law intends should be filled at once. See *e.g.* Mootrie v. Hunt, 4 Bradf. (N. Y.) 173; 27 How. (N. Y.) Pr. 26; 2 Redf. (N. Y.) 100; 60 A. 379; 2 Dem. 286; 4 Dem. 137; 1 Dem. 1. That a widow or next of kin has no preference in the choice of special or "temporary" administrator, see Lamb v. Helm, 56 Mo. 420. See Flora v. Mennice, 12 Ala. 836; 141 Mo. 642, 43 S. W. 617. Cf. Moors v. Alexander, 81 Ala. 509, 8 So. 199. After a removal from office, the special administrator may be appointed. De Flechier, Succession of, 1 La. Ann. 20. Or pending appeal from a decree in probate or during litigation over a will, etc. Searle v. Court of Probate, 7 R. I. 270; Thompson v. Tracy,

## CHAPTER V.

## THE BONDS OF EXECUTORS AND ADMINISTRATORS.

136. **An executor or administrator is usually required to qualify by giving bond** before letters conferring the appointment can issue to him. This bond is expressed in such sum as the probate court may see fit to order; its form is established by the court after the statute requirements; it is made payable to the judge or his successors in office; its conditions recite the essential duties of the trust reposed in the appointee; and, filed in the probate registry, it serves as legal security furnished by the executor or administrator for the benefit of all persons who may be interested in the estate, and in case of maladministration may be sued upon accordingly. Sometimes sureties are required on these bonds; and sometimes sureties are dispensed with.<sup>1</sup>

137. **In English practice, the old spiritual court exerted so little authority over an executor,** whose credentials were thought to be derived rather from his testator's selection than the ordinary, that bonds could not be required from such fiduciaries. But chancery

60 N. Y. 174; *Lamb v. Helm*, 56 Mo. 420. This authority lasts until the contest is entirely over (e.g., will duly admitted and executor qualified), inclusive of appeal. *Ro Bards*, 89 Mo. 303, 1 S. W. 222; *Baldwin v. Mitchell*, 86 Md. 379, 38 A. 775; *Brown v. Ryder*, 42 N. J. Eq. 356, 7 A. 568; *Crozier, Re*, 65 Cal. 332, 4 P. 109. Cf. 63 Tex. 220 (a later litigation); *Harrison v. Clark*, 52 A. 514, 95 Md. 908 (two wills in contest).

This special administration appointment is preliminary to a general one, according to the usual American practice, lasts for an emergency undefined as to time, and cannot be granted while a general appointee holds office, nor so that the special appointee shall fulfil all the functions of general executor or administrator. As for the departure of a general executor or administrator for foreign parts, after his appointment, to remain long absent, or his subsequent incapacity, by reason of insanity, to the plain detriment of the interests of an unsettled estate, American practice seems to prefer to the vague and limited grants of administration, usual in English practice, that a vacancy shall be made in the office, and that vacancy filled in the usual way. See *post*, c. 6. Though perhaps the appointment of an attorney to accept service may obviate objections. See Mass. Pub. Stats. c. 132, §§ 8-13.

Every special administrator, or temporary appointee *pendente lite*, should, when his authority ceases, pay over what he may have received, and transmit the estate to the general appointee, or do otherwise with it as the probate court shall direct; rendering a proper account of his doings and retaining a proper compensation for his services; whereupon his responsibility comes to an end, if his duties have been faithfully performed. See *Ellmaker's Estate*, 4 Watts, 36; *Duncan, Re*, 3 Redf. (N. Y.) 153. See 89 Mo. 303.

See further, as to special administration appointments in local practice, *Dean v. Biggers*, 27 Ga. 73 (upon application for general administration); *McNairy v. Bell*, 6 Yerg. 302; 10 Humph. 205; 1 Sneed, 430; 47 Iowa, 242.

<sup>1</sup> Such is today the usual probate practice in our various States. See local codes.

stretched its arms for the better protection of widows and orphans while the ordinary was thus powerless, so that an insolvent or bankrupt executor could not only be restrained by the appointment of a receiver, but compelled in chancery, like any other trustee, to furnish security before entering actively upon his trust.<sup>1</sup> The American rule, both as to the appointment and qualification of executors, is far more consonant to justice and impartial, and brings administrators and executors more nearly under one system of rules. The qualification of executors is not left to the interposition of equity, but is confided in the first instance by legislation to the discretion of the court most competent to exercise it; so that the probate court now passes upon the bond in connection with the appointment, withholding letters testamentary unless the executor complies with the judge's prudent requirement. Local statute prescribes the form and manner of giving this bond, as well as indicating the extent of security.<sup>2</sup>

<sup>1</sup> *Wms. Exrs.* 237; *Holt*, 310; 2 *Vern.* 249; *Slanning v. Style*, 3 P. *Wms.* 336. See also *Cronk v. Cronk*, 148 Ala. 337, 42 So. 450 (chancery bond required).

<sup>2</sup> If a person appointed executor refuses or neglects unreasonably to give the statute bond as required, letters testamentary will be granted to the other executors if there be any such capable and willing; otherwise, administration with the will annexed. In other words, qualification by bond is a prerequisite to receiving letters testamentary; the executor derives his office only under a testamentary appointment which has afterwards been confirmed by a decree of the probate court and the grant of letters; nor is one entitled to exercise any power as executor until he has been duly qualified. Such is the rule of most American States, as prescribed by the legislature. *Gardner v. Gnat*, 19 Ala. 666; *Echols v. Barrett*, 6 Ga. 443; *Hall v. Cushing*, 9 Pick. 395; *Fairfax v. Fairfax*, 7 Gratt. 36; *Holbrook v. Bentley*, 32 Conn. 502; *Webb v. Dietrich*, 7 Watts & S. 401; *Pettingill v. Pettingill*, 60 Me. 411; 109 N. W. 776; *Bankhead v. Hubbard*, 14 Ark. 298; *Moore v. Ridgeway*, 1 B. Mon. 234; *Bodley v. McKinney*, 17 Miss. 339; *Phillips v. Stewart*, 59 Mo. 491.

As to furnishing a bond with surety or sureties, however, the executor is still favored above administrators in practice. Executors are exempted from furnishing a surety or sureties (as such statutes frequently direct) when the testator has ordered or requested such exemption, or when all the persons interested in the estate certify their consent, or, upon being cited in, offer no objection. But even thus, the judge is still to regard the interests of the estate, according to the preferable practice, and may, at or after the granting of letters testamentary, require a bond with sufficient surety or sureties, if he thinks this desirable because of some change in the situation or circumstances of the executor or for other sufficient cause. *Smith v. Phillips* 54 Ala. 8; *Clark v. Niles*, 42 Miss. 460; *Atwell v. Helm*, 7 Bush, 504. See 62 S. E. 549, 148 N. C. 461; *Wells v. Child*, 12 Allen, 330; *Johns v. Johns*, 23 Ga. 31; *Freeman v. Kellogg*, 4 Redf. (N. Y.) 218. Nor is even the testator's request for such an exemption to be taken otherwise than as the expression of his confidence in the person he himself designated. *Fairfax v. Fairfax*, 7 Gratt. 36; *Langley v. Harris*, 23 Tex. 564. See *Bankhead v. Hubbard*, 14 Ark. 298; 8 B. Mon. 67; *Wilson v. Whitefield*, 38 Ga. 269; *Wms. Exrs.* 529; 80 N. Y. S. 789; 63 S. W. 479, 23 Ky. Law, 605; 60 S. W. 396, 22 Ky. L. R. 1267, 109 N. W. 776, 135 Iowa, 430; 66 P. 607, 134 Cal. 357 (oath of value, if exempted).

In each State, the legislature prescribes the course to be pursued and furnishes a rule for judicial action, by no means constant and uniform. *Mandeville v. Mandeville*, 8 Paige, 475; 2 Redf. (N. Y.) 156; 4 Redf. 218; 60 Barb. 56; *Wood v. Wood*, 4 Paige, 299; *Powel v. Thompson*, 4 Desau. 162; *Peale v. White*, 7 La. Ann. 449; 12 La. Ann.

138. An executor who is residuary legatee may dispense with the usual bond, and at his option give a bond with condition merely to pay all debts, and legacies, and the statute allowances to widow and minors.<sup>1</sup>

139. The practice of taking bonds from administrators, as distinguished from executors, must have prevailed in the English spiritual courts long before the first English colony was planted in America. For the statute 21 Hen. VIII, c. 5, § 3, directs the ordinary to take surety on granting administration.<sup>2</sup> The English court of probate act now in force does not insist upon sureties in an administration; and there are instances in which the court has accordingly dispensed with them; though only by way of exception to the rule, and at all events so as to insist still upon a bond.<sup>3</sup>

399; 27 La. Ann. 344. But the bond, however given, and whether with or without sureties, contemplates commonly a due administration of the estate to the full extent of paying all debts and legacies, distributing the residue properly, and rendering an inventory and accounts to the court. It must be in statute form. 77 Me. 157.

<sup>1</sup> Duvall v. Snowden, 7 Gill & J. 430; Morgan v. Dodge, 44 N. H. 255, 82 Am. Dec. 213; 4 Pick. 97; Colwell v. Alger, 5 Gray, 67. See also Wms. Exrs. 543; 2 Stra. 1137.

The advantage of such a bond is in saving him the labor and expense of an inventory, reducing the penal sum to the minimum of satisfying these claimants and reserving all evidence of assets to himself; and the law thus indulges the residuary legatee, inasmuch as it is no concern of others what may be the bulk of the fortune he acquires, provided their demands are satisfied. But the disadvantage is that such a bond conclusively admits assets sufficient for the payment of all debts, legacies, and allowance in full, binding the executor and his sureties absolutely in the penal sum, to pay accordingly, even though the estate should prove insolvent; and hence an executor who does not feel certain when he qualifies that the assets are ample for all such demands, should qualify in common form, so as to limit his liability by the inventory, as returned to the court, and the actual assets. See Jones v. Richardson, 5 Met. 247; Kreamer v. Kreamer, 52 Kan. 597, 35 P. 214; Lafferty v. Savings Bank, 76 Mich. 35, 43 N. W. 34. See as to substituting the usual bond later, Alger v. Colwell, 2 Gray, 404; Moody v. Davis, 67 N. H. 300, 38 A. 464; Cleaves v. Dockray, 67 Me. 118. As to bond by executor with a life interest in the personal property, see 7 R. I. 270. Court cannot compel an inventory to be furnished under a residuary legatee's bond. State v. Clark, 53 A. 636, 24 R. I. 470.

<sup>2</sup> Wms. Exrs. 529-533. And see Stat. 22 & 23 Car. II, c. 10 (from 1671); 20 & 21 Vict. c. 77, §§ 80-82. The form of administration bond required by the present rules of the English probate court may be seen in Wms. Exrs. 532.

<sup>3</sup> Cleverly v. Gladdish, 2 Sw. & Tr. 335; 34 L. J., P. M. & A. 55. The court allows a bond with one surety under some circumstances. L. T. 33 N. S. 71. Where the administrator is out of England, the sureties must usually be resident; a rule relaxed latterly, however. Cf. O'Byrne, Goods of, 1 Hagg. 316; Hernandez, Goods of, L. R. 4 P. D. 229; Houston's Goods, L. R. 1 P. & D. 85; 3 Sw. & Tr. 439; 4 Hagg. 207. See Wms. Exrs. 545. See further, Sutherland's Goods, 31 L. J., P. M. & A. 126; Ross, Goods of, L. R. 2 P. D. 274 (bond increased while the administrator had gone abroad). The court has much discretion. Under a grant of limited administration, a bond is sometimes taken in a penal sum merely nominal; but the usual penal sum is double the amount of the estate sworn. Bowlby, Goods of, 45 L. J., P. D. A. 100; Wms. Exrs. 531-533. See further, 25 W. R. 698; Act, 20 & 21 Vict. c. 77, § 73; 2 Phillim. 578; Wms. Exrs. 548 (as to peculiar bonds for limited or special administration, etc.). For *de bonis non* double the amount of the unadministered estate is proper. Oakley's Goods, (1896) P. 7.

140. **American practice in respect of administration bonds is based upon English requirements under the earlier statutes cited in the preceding section; and while, in all or most States, the form of bond is carefully prescribed, as seems quite appropriate to our statute tribunals which a legislature invests with probate jurisdiction, Stat. 22 & 23 Car. II, c. 10, appears to have supplied the model.<sup>1</sup>**

141. **Administration bonds, as our codes usually provide, must be given by the administrator, with at least two sufficient sureties, in such penal sum as the court shall direct;<sup>2</sup> double the estimated value of the estate to be administered serving as the usual basis**

<sup>1</sup> Thus, in Massachusetts, the bond of an original administrator binds him to return an inventory within the time designated by law; to administer according to law all the personal estate and the proceeds of all real estate sold for the payment of debts; to render regular accounts of his administration; to pay any balance remaining in his hands upon the settlement of his accounts to such persons as the court shall direct, and to deliver his letters of administration into the probate court in case any will of the deceased is hereafter proved and allowed. Mass. Gen. Stats. c. 94. For administrators with the will annexed, and likewise administrators *de bonis non* with the will annexed, a similar form is prescribed, but with appropriate allusions added to the payment of "legacies." *Ib.* See *Casoni v. Jerome*, 58 N. Y. 315. The bond of such administrators must conform to the peculiar conditions of a will. *Small v. Commonwealth*, 8 Penn. St. 101; *Frazier v. Frazier*, 2 Leigh, 642. Cf. *Judge of Probate v. Claggett*, 36 N. H. 381. A special administrator's bond is conditioned to return an inventory within the specified time; to account on oath whenever required for all the personal property of the deceased that shall be received by him in such capacity; and to deliver the same to whoever shall be appointed executor or administrator of the deceased, or to such other person as shall be lawfully entitled to receive the same. See *Colvin, Re*, 3 Md. Ch. 278; *Bloomfield v. Ash*, 4 N. J. L. 314. Whoever administers with will annexed must give bond, whether legatee, next of kin, widow, or creditor. *Brown, Ex parte*, 2 Bradf. (N. Y.) 22. In most of our States, local statutes relative to administration will be found to suggest the varying forms appropriate to different kinds of administration, even though no precise form be specified; and probate tribunals should see that all probate bonds conform to law, and are correctly expressed. As to construing statute provisions respecting the several conditions of an administrator's bond, see *Lanier v. Irvine*, 21 Minn. 447; *Hartzell v. Commonwealth*, 42 Penn. St. 453; *Ordinary v. Smith*, 14 N. J. L. 479; *Hunt v. Hamilton*, 9 Dana, 90; *Judge of Probate v. Claggett*, 36 N. H. 381, 72 Am. Dec. 314. As to defects in form of bond, see *Frye v. Crockett*, 77 Me. 157. But as to real estate covered, see *Hughlett v. Hughlett*, 5 Humph. 453. See *Salyer v. State*, 5 Ind. 202. The public administrator has the option in some States either to furnish a separate bond for every estate which he may be called upon to administer, or a general bond for the faithful administration of all estates on which administration is granted to him; and in either case with conditions expressed appropriate to his peculiar functions. Mass. Gen. Stats. c. 95, § 7; *Buckley v. McGuire*, 58 Ala. 226; *State v. Purdy*, 67 Mo. 89; 53 Neb. 241, 75 Am. St. Rep. 98, 78 N. W. 507; *Healy v. Superior Court*, 60 P. 428, 127 Cal. 359; *Payne v. Thompson*, 48 Ala. 535.

<sup>2</sup> See local codes; *Clarke v. Chapin*, 7 Allen (Mass.) 425; *Tappan v. Tappan*, 4 Post. (N. H.) 400; *Bradley v. Commonwealth*, 31 Penn. St. 522; *Atkinson v. Christian*, 3 Gratt. 448; *Myrick (Cal.)* 239; 15 La. Ann. 551; *Ferry's Succession*, 31 La. Ann. 727. There are circumstances (as in ancillary administration for some particular purpose) where a small penal sum is appropriate. *Piquet, Re*, 5 Pick. 65. The security required should be for no more property than that on which administration is granted in the State. *Normand v. Groggnard*, 17 N. J. Eq. 425. A disputed claim not probably

for fixing the amount. In this and various other respects, the same holds generally true of executors' bonds.<sup>1</sup>

142. Courts disincline to treat a probate bond as void, to the detriment of an estate, by reason of irregularities attending its execution, provided a regular execution was obviously intended by principal and sureties.<sup>2</sup>

enforceable may be ignored in fixing the amount. 3 Dem. 427. Or property transferred by the decedent fraudulently or otherwise. 3 Dem. 548. Where a will gives the executor full power to deal with real as well as personal estate, or where an administrator may deal under statute with land, the penalty of his bond should be reckoned accordingly. *Ellis v. Witty*, 63 Miss. 117; 60 P. 428, 127 Cal. 659. The local statute sometimes permits the penalties to be reduced under an administration bond (e.g., with will annexed) if the interested parties assent. Or even so that sureties may be dispensed with. See 3 Dem. 53; *supra* (as to executors), 137.

<sup>1</sup> A discretion as broad as that conferred on the new probate court of England by Parliament is not usually exercised by the probate courts in this country as to administration bonds. See 5 Rich. (S. C.) Eq. 475. The register or clerk in some States attends to the qualification by bond; more commonly, however, the judge, as to the main particulars of security; his approval being written at the foot of the bond in token that the administrator has fully qualified, and the letters being meanwhile withheld by the register. *Austin v. Austin*, 50 Me. 74, 79 Am. Dec. 597. See *Jones v. Dixon*, 21 Mo. 538; 54 Mo. 539.

The bond of an administrator or executor runs in some States to the State; in others, to the judge of probate and his successors, as in the statute 22 Car. II, c. 10. *Johnson v. Fuquay*, 1 Dana, 514; *Vanhook v. Barnett*, 4 Dev. L. 268. If one who has applied to administer does not qualify with sureties within a reasonable time, it is the duty of the court to appoint another; and the office of administrator is not filled until the bond is given. *Crozier v. Goodwin*, 1 Lea, 125; *Feltz v. Clark*, 4 Humph. 79; *O'Neal v. Tisdale*, 12 Tex. 40. But where the administrator fully qualifies, giving bond according to law, the decree of the court may be considered his sufficient appointment whether he receives his formal letters or not; for the letters issue as of the same date, and if not actually delivered, are to be deemed ready for delivery. *State v. Price*, 21 Mo. 434. A judge may require sureties to justify if there is reasonable doubt of their responsibility. 48 Mich. 318, 12 N. W. 197.

A probate bond which divides up the penal sum among the sureties is not void; but this form of bond has been regarded with disfavor by American courts in the absence of legislation which expressly sanctions it. Cf. *Baldwin v. Standish*, 7 Cush. 207; Act, 20 & 21 Vict. c. 77. With the increasing wealth of this country, and the growing value of estates brought necessarily into the probate court for settlement, it seems desirable that bonds of this character should be authorized, as they now are so frequently in the case of public officials. One should not be asked to risk utter ruin for the sake of a friend. See 144 as to surety companies.

<sup>2</sup> 2 Stew. (Ala.) 466, 20 Am. Dec. 56; *Luster v. Middlecoff*, 8 Gratt. 54, 56 Am. Dec. 129. As in filling blanks wrongly. Omissions are sometimes supplied in a blank by construing the decree of appointment and the bond together. *State v. Price*, 15 Mo. 375. Cf. *Cowling v. Justices*, 6 Rand. 349; 68 N. E. 205, 184 Mass. 210, 100 Am. St. Rep. 552; *Spencer v. Cahoon*, 4 Dev. L. 225. For sureties to execute for a blank amount imports an authority to the principal, to whose care they confide the bond, to fill in such a penal sum as the court may require. Such a practice, however, is exceedingly careless, and no probate court should sanction it. Leaving the date of the bond blank, however, in order that the principal may fill it up according to the date of probate decree, is quite common; nor does this course appear objectionable. See further, *Jones v. Gordon*, 2 Jones (N. C.) Eq. 352; *Mumford v. Hall*, 25 Minn. 347; *Herriman v. Janney*, 31 La. Ann. 276; *Maxwell, Re*, 37 Ala. 362, 79 Am. Dec. 62; 101 Cal. 125, 35 P. 567, 40 Am. St. Rep. 46. As to substantial though not literal compliance with statute, see *Ordinary v. Cooley*, 30 N. J. L. 179; 8 Penn. St. 101; *Frazier v. Frazier*, 2 Leigh, 642; *Roberts v. Calvin*, 3 Gratt. 358; *Rose v. Winn*, 51

143. A probate bond may sometimes bind as a common-law bond though invalid under statute.<sup>1</sup> And the fact, that one who was improperly appointed acts under the letters granted to him, is held to render him and his sureties liable on their bond to the parties interested in the estate, on general principle.<sup>2</sup>

144. The sufficiency of probate bonds as to the parties offered is sometimes considered.<sup>3</sup>

Tex. 545; *Burnett v. Nesmith*, 62 Ala. 261; *Frye v. Crockett*, 77 Me. 157; 45 A. 921, 195 Penn. St. 230. Obligors on a probate bond who have executed it and suffered the bond to go upon record, may, on general principles, be estopped from afterwards denying its validity or availing themselves of irregularities, or setting up their private arrangements as to the manner in which the bond should be filled out and used, to the injury of innocent interested parties who were led to rely upon the security, especially where they themselves had not been misled to their own injury. *Veach v. Rice*, 131 U. S. 293, 33 L. Ed. 63; *Franklin v. Depriest*, 13 Gratt. 257; *Cohea v. State*, 34 Miss. 179; 5 Daly (N. Y.) 308; *Wolff v. Schaeffer*, 74 Mo. 154; *Fuller v. Dupont*, 67 N. E. 662, 183 Mass. 596; 16 Lea, 321; *McGaughey v. Jacoby*, 54 Ohio St. 487, 44 N. E. 231; *Nash v. Sawyer*, 87 N. W. 707, 114 Iowa, 742 (cannot set up that the appointment was void); 83 N. W. 875, 9 N. D. 428. One who signs the probate bond may retract, if others intended do not sign, or the principal fails to make good his promises, but he must do so before the bond is returned and the court and innocent parties have placed reliance upon it. 4 La. Ann. 545; 10 La. Ann. 612; *Wolff v. Schaeffer*, 74 Mo. 154; *Berkey v. Judd*, 34 Minn. 393. But *qu.* whether, in States where two sureties to a probate bond are requisite, one surety may not presume that the judge will not accept the bond unless another surety executes. It is plain, however, that one who executes as surety a probate bond, without ascertaining in what manner blanks are filled, or what other signatures added before the bond becomes approved and filed, trusts his principal, in many instances, farther than prudence warrants. Cf. 86 Law T. 261. A bond with one surety where the law required two is not void. 68 Ala. 107. Cf. 45 A. 921, 195 Penn. 230 (discretion of court).

But alterations after execution, and irregularities of injurious effect, to which the bondsmen themselves were not privy, but rather they to whom the security was given, and which the bondsmen cannot be said to have adopted by open acts or inexcusable silence, may release them from responsibility. And in such connection a judge or register is greatly to be blamed who changes in material respects or mutilates the bond submitted to him, without the knowledge of all the parties executing it; or who, without assent of the sureties, directs that the bond given shall stand over for something else. See *Howe v. Peabody*, 2 Gray, 556; *Veach v. Rice*, 131 U. S. 293; *Fisher, Re*, 15 Wis. 511. It follows that a bond may, under peculiar circumstances, bind the principal but not the sureties. *Howe v. Peabody*, 2 Gray, 556.

<sup>1</sup> *McChord v. Fisher*, 13 B. Mon. 193.

<sup>2</sup> *Shalter's Appeal*, 43 Penn. St. 83, 82 Am. Dec. 552; *Cleaves v. Dockray*, 67 Me. 118; *Frye v. Crockett*, 77 Me. 157. An administrator's bond, though not approved by the probate court, may be good as a voluntary bond. *State v. Creusbauer*, 68 Mo. 254.

<sup>3</sup> As to non-residents see local code; *Barksdale v. Cobb*, 16 Ga. 13; *Jones v. Jones*, 12 Rich. L. 623; *Clarke v. Chapin*, 7 Allen, 425. And see *Wms. Exrs.* 544; *Hernandez, Goods of*, L. R. 4 P. D. 229. As to parties (*e. g.*, attorneys) prohibited in this connection, see *Hicks v. Chouteau*, 12 Mo. 341; *Wright v. Schmidt*, 47 Iowa, 233. See further, *Ross v. Mims*, 15 Miss. 121.

Fidelity insurance companies, properly chartered, are expressly allowed in these later times to act as sureties on fiduciary bonds as well as individuals. See *Hunt's Goods*, (1896) P. 288.

In American practice, sureties, to save themselves trouble, frequently execute a probate bond in anticipation of the executor's or administrator's appointment; their principal holding the instrument until ready to qualify. Such a bond should be drawn



145. On their probate bond, co-executors or co-administrators become, as a rule, jointly liable as sureties for the acts and defaults of one another;<sup>1</sup> and jointly as principals, moreover, to indemnify the surety who has been subjected to liability for the default of one of them during the continuance of the joint office.<sup>2</sup> The real tenor of the bond must, however, determine greatly its legal effect, on the usual theory of principal and surety, though not without reference to the law in pursuance of which it was made. In various jurisdictions, the local statute authorizes the court, in case joint executors or administrators are appointed, to take either a separate bond with sureties from each, or a joint bond with sureties from all.<sup>3</sup>

146. The liability of a surety on an executor's or administrator's bond is limited to the assets which rightfully come, or ought to have come, to the principal's hands in the State or country in which he was appointed and qualified.<sup>4</sup> This will be better understood, when, in the course of the present treatise, the subject of administration assets is hereafter discussed.<sup>5</sup> Failure to perform the duties recited in the bond, such as returning an inventory or rendering an account, is also a breach for which principal and sureties are liable, even though the damage sustained may prove but

up with an ample penal sum, and the principal should come prepared to establish its sufficiency to the satisfaction of the court; and care should be taken, moreover, that no material change is made in the bond without reference anew to all the sureties. See *New Orleans Canal Co. v. Grayson*, 4 La. Ann. 511.

<sup>1</sup> *Litterdale v. Robinson*, 2 Brock. 159; *Brazer v. Clark*, 5 Pick. 96; *Moore v. State*, 49 Ind. 558; 76 Va. 85.

<sup>2</sup> *Dobyns v. McGovern*, 15 Mo. 662; 54 Kan. 793, 39 P. 713, 45 Am. St. Rep. 308. And this, even though one should die, unless proper steps are taken to have the bond made inoperative. See *Municipal Court v. Whaley*, 55 A. 750, 25 R. I. 289, 63 L. R. A. 235, 105 Am. St. Rep. 890; 62 Ala. 269; 15 Mo. 662. Cf. 5 Pick. 96; *Lancaster v. Lewis*, 93 Ga. 727, 21 S. E. 155. But as to the sureties in a joint administration bond, it is held that they are not liable to one administrator for the defaults of the other. *Hael v. Blanchard*, 4 Desau. 21. See *Elliott v. Mayfield*, 4 Ala. 417.

<sup>3</sup> Mass. Gen. Stats. c. 101, § 14. See 65 Tex. 152.

<sup>4</sup> *Fletcher v. Weir*, 7 Dana, 345, 32 Am. Dec. 96; *Governor v. Williams*, 3 Ired. L. 152, 38 Am. Dec. 712. All moneys received under color of such official authority are included. *State v. Young*, 34 S. E. 444, 125 N. C. 296.

<sup>5</sup> The proceeds of such assets, arising out of sales, conversions, change of investment, and transfers in general, also profit and interest, are properly thus included. *Watson v. Whitten*, 3 Rich. (S. C.) 224; *Verret v. Belanger*, 6 La. Ann. 109; *McDonald v. People*, 78 N. E. 609, 222 Ill. 325. So, too, effects left in the executor's or administrator's hands, and property which has come to his possession or knowledge and remains unaccounted for; and this even though he received the property before his appointment; since the liability extends to assets received before as well as after the execution of the bond. *Boulware v. Hendricks*, 23 Tex. 667; 99 N. W. 582, 90 Me. 505, 10 L. R. A. 33, 60 Am. St. Rep. 285; *Gottsberger v. Taylor*, 19 N. Y. 150; *Goode v. Buford*, 14 La. Ann. 102; *Choate v. Arrington*, 116 Mass. 552; *Head v. Sutton*, 31 Kan. 616, 3 P. 280.

nominal.<sup>1</sup> If an executor or administrator is able to pay a debt due by him personally to the estate, his sureties will be liable with him, unless he discharges it.<sup>2</sup> Ordinarily, as will be seen hereafter, administration does not extend to the real estate of the deceased.<sup>3</sup> But statutes regulate this whole subject, and ultimately, according to the modern tendency, an administrator or executor may incur an official responsibility for rents and profits or for the proceeds of real estate, so as to involve the sureties on his general bond for his default;<sup>4</sup> bonds in general being, furthermore, construed according to their particular tenor.<sup>5</sup>

<sup>1</sup> *Forbes v. McHugh*, 152 Mass. 412, 25 N. E. 622; 83 Wis. 394, 53 N. W. 691; 230; 166 Mass. 569, 44 N. E. 1065.

<sup>2</sup> *Piper's Estate*, 15 Penn. 533. And see *McGaughey v. Jacoby*, 54 Ohio St. 487, 44 N. E. 231; *Lyon v. Osgood*, 58 Vt. 707, 7 A. 5. Money set down in the inventory as part of the estate must in some way be accounted for. *Goode v. Buford*, 14 La. Ann. 102; *Wattles v. Hyde*, 9 Conn. 10. As to executor's or administrator's own debt, see *Judge of Probate v. Sulloway*, 44 A. 720, 68 N. H. 511, 49 L. R. A. 347, 73 Am. St. Rep. 619; 85 Tenn. 486, 3 S. W. 178; *Sanders v. Dodge*, 103 N. W. 597, 140 Mich. 236; 82 S. W. 235, 26 Ky. Law, 494; 77 P. 748, 45 Oreg. 247. See 173 Mass. 112, 53 N. E. 152.

<sup>3</sup> Hence rents received after the death of an intestate may not be thus included, nor the proceeds of lands sold, for which last an administrator usually procures a license and gives a special bond. *Cornish v. Wilson*, 6 Gill, 299; *Commonwealth v. Higert*, 55 Penn. St. 236; *Hutchenson v. Pigg*, 8 Gratt. 220; *Reno v. Tyson*, 24 Ind. 56; 22 N. E. 969, 121 Ind. 92; 101 Ga. 687, 29 S. E. 37; 2 J. J. Marsh. 49; *Brown v. Brown*, 2 Harr. (Del.) 51; *People v. Huffman*, 55 N. E. 981, 182 Ill. 390; *Forbes v. Keyes*, 78 N. E. 733, 193 Mass. 38; 40 S. E. 683, 62 S. C. 306. Cf. 90 S. W. 197, 40 Tex. Civ. App. 489.

<sup>4</sup> *Phillips v. Rogers*, 12 Met. (Mass.) 405; *Wade v. Graham*, 4 Ohio, 126; *Stong v. Wilkison*, 14 Mo. 116; *Judge of Probate v. Heydock*, 8 N. H. 491; 5 Ala. 117. An executor receiving the residue in trust for charities, but giving no bond as trustee nor turning it over to the trust, his bondsmen are liable for it. *White v. Ditson*, 140 Mass. 351, 54 Am. Rep. 473, 4 N. E. 606. And see 14 R. I. 495. But cf. *Freeman v. Brown*, 41 S. E. 385, 115 Ga. 23. See also, *Dowling v. Feeley*, 72 Ga. 557; *Reherd v. Long*, 77 Va. 839; *Mann v. Everts*, 64 Wis. 372, 25 N. W. 209; 78 Va. 720. As to the proceeds of life insurance policies not used in paying debts, see 16 Lea, 321; *Nickels v. Stanley*, 81 P. 117, 146 Cal. 724. Failure to pay over balance decreed is a breach. 89 N. W. 742, 64 Neb. 175; *Ferguson v. Carr*, 107 S. W. 1177, 85 Ark. 246. See further, 77 Mo. 175; 34 S. E. 213, 108 Ga. 430; 111 S. W. 817, 213 Mo. 66.

<sup>5</sup> The obligation is not to be extended beyond the terms of one's undertaking. *People v. Petrie*, 61 N. E. 499, 191 Ill. 497, 85 Am. St. Rep. 268; 57 S. W. 1087, 157 Mo. 609, 80 Am. St. Rep. 643. Cf. 67 P. 333, 135 Cal. 361.

Probate bonds in these days are usually so worded as to embrace all the general functions which the executor or administrator may be required to perform in pursuance of his trust, both towards the court, and with respect of the creditors, legatees, distributees, and all others interested. *Woodfin v. McNealy*, 6 Fla. 256; *People v. Miller*, 2 Ill. 83; *Hazen v. Darling*, 2 N. J. Eq. 133; 62 N. H. 228; *Williams v. Starkweather*, 66 A. 67, 28 R. I. 145 (equity decree).

As to the construction of certain statute phrases, see local codes and local decisions. As to "legatee," see *Small v. Commonwealth*, 8 Penn. St. 101; *Frazier v. Frazier*, 2 Leigh, 642. But cf. *Peoples v. Peoples*, 4 Dev. & B. L. 9; *Judge of Probate v. Claggett*, 36 N. H. 381, 72 Am. Dec. 314. "Due administration of the estate" includes the payment of the balance to the persons entitled. *Cunningham v. Souza*, 1 Redf. (N. Y.) 462. And see *Sanford v. Gilman*, 44 Conn. 461. Statutes are differently construed. Cf. 1 Litt. 93; *Wms. Exrs.* 540, 541. And see 72 N. Y. 565. The sureties

147. The surety to a probate bond may, upon his petition, be discharged from all further responsibility, if the court deems it reasonable or proper, after due notice to all persons interested, as various local statutes provide;<sup>1</sup> whereupon other security will be required of the executor or administrator, in default of which his letters may be revoked.<sup>2</sup> Release of the sureties on the bond must, however, be a judicial act regularly performed.<sup>3</sup>

148. A new bond will be required of an executor or administrator, not only (as local acts often provide) when a former surety is discharged upon his request, leaving the probate security inadequate, but in general wherever it appears to the court that the sureties are insufficient or the penal sum itself under existing circumstances.<sup>4</sup> Whenever a new bond has been required of the

are not usually liable for the acts of an executor or administrator in meddling with property to which he has or acquires no official right. *McCampbell v. Gilbert*, 6 J. J. Marsh. 592. And see 56 How. (N. Y.) Pr. 178; *Jackson v. Wilson*, 117 Ala. 432, 23 So. 521. Nor for any mere breach by him of a personal duty. 101 Ga. 46, 28 S. E. 674; 37 S. C. 174, 15 S. E. 922. Nor with respect to property held or acts done by him in some other distinct capacity. *Barker v. Stanford*, 53 Cal. 451; *Sims v. Lively*, 14 B. Mon. 433; *Reeves v. Steele*, 2 Head, 647. As to the same person being guardian or trustee and administrator, see 247, *post*; *Schoul. Dom. Rel.* § 324; 48 S. E. 699, 121 Ga. 111; 81 P. 117, 146 Cal. 724; 61 N. E. 491, 192 Ill. 382. Where one is both executor and trustee under a will, he should, of course, give separate bonds for each trust. 85 Ind. 312. As to liability of sureties where the executor or administrator dies and his personal representative settles the accounts, see *Williams v. Flippin*, 68 Miss. 680, 10 So. 52, 24 Am. St. Rep. 297. In general, liability on the fiduciary bond is limited to such damages as are equitably due to the party or parties for whose benefit the action is brought, and the penal sum named marks only a final limit. *State v. French*, 60 Conn. 478, 23 A. 153; 50 S. E. 388, 121 Ga. 111; 62 N. H. 228.

Sureties on a probate bond, it is held, are liable for defaults of the principal occurring after their own death, especially if they expressly bind in terms their own executors and administrators. *Mundoriff v. Wangler*, 44 N. Y. Super. 495; 2 Dem. 469. See next section.

<sup>1</sup> 3 Redf. (N. Y.) 43; 30 Ark. 515; 1 Dana, 514; 3 La. Ann. 646; 8 Rich. 331; *Harrison v. Turbeville*, 2 Humph. 241; *Jones v. Ritter*, 56 Ala. 270; 2 Dem. 201, 251; 3 Redf. (N. Y.) 507; 27 La. Ann. 344. The statute discretion of the court to discharge a surety from liability (unlike that of requiring new and additional security) appears to be strictly construed. *Jones v. Ritter*, 56 Ala. 270; *Wood v. Williams*, 61 Mo. 63; *People v. Curry*, 59 Ill. 35. Such proceedings are summary, and the record should show the essential facts. 16 La. 652; 63 Md. 14. Discharge upon *ex parte* proceedings is wrongful. 36 So. 315, 112 La. 305.

<sup>2</sup> *Ib.*

<sup>3</sup> Often before such release is permitted the principal may have to settle his balances or else furnish new sureties, as various codes require. See *Sanders v. Edwards*, 29 La. Ann. 696; *Brown v. Weatherby*, 71 Mo. 152; *Brooks v. Whitmore*, 139 Mass. 356. The local statutory provisions for such release must be duly complied with by the court. *Eddy v. People*, 58 N. E. 397, 187 Ill. 304; *Clark v. American Surety Co.*, 171 Ill. 235.

<sup>4</sup> *Loring v. Bacon*, 3 Cush. 465; *Renfro v. White*, 23 Ark. 195; 22 Ark. 328. And see 36 La. Ann. 414 (newly discovered assets); 70 N. Y. S. 762; 29 So. 219, 104 La. 573; *Ward v. State*, 40 Miss. 108; *Governor v. Gowan*, 3 Ired. L. 342. Statutes may well confer authority upon the court to require new or additional security at the court's own instance. Petition is, however, usually brought by some interested party.

executor or administrator, by way of substitution, the sureties in the prior bond are usually treated as liable for all breaches of condition committed by him before the new bond is executed and accepted by the court;<sup>1</sup> but as released and exempt from liability for his defaults committed afterwards.<sup>2</sup> Where, however, a new additional bond is given by the executor or administrator for the performance of his trust, the second bond is cumulative and relates back, so that the sureties on the new and original bonds shall all be regarded as parties to a common undertaking.<sup>3</sup>

149. **As to lost and missing probate bonds**, since probate bonds are usually copied into the probate records, in American practice, the record may serve as secondary evidence for all needful purposes where the original bond is missing from the files. Local acts provide, in some instances, for a substitution, by judicial decree, where the official bond together with the record thereof has been lost or destroyed.<sup>4</sup>

Sureties, themselves, according to the practice of certain States, may, instead of petitioning to be discharged, ask for what is termed counter-security. *Caldwell v. Hedges*, 2 J. J. Marsh. 485; *Brown v. Murdock*, 16 Md. 521; 3 Sm. & M. 234. If the principal fails to give the new or additional bond within such reasonable time as the court may have ordered, he will be removed, and some other person who can qualify appointed in his stead. *National Bank v. Stanton*, 116 Mass. 435. See *Bills v. Scott*, 49 Tex. 430. It is quite desirable that the discretion of the probate court in requiring bonds should extend to all changes of circumstances as to the representative himself, the sureties, or the amount of the estate.

<sup>1</sup> *McMeeken v. Huson*, 3 Strobb. 327; *Bobo v. Vaiden*, 20 S. C. 271.

<sup>2</sup> *State v. Stroop*, 22 Ark. 328; *Lingle v. Cook*, 32 Gratt. 262; 3 Sm. & M. 234; *State v. Fields*, 53 Mo. 474; *Perry v. Campbell*, 10 W. Va. 228; 68 Ala. 7, 21; 36 La. Ann. 414. As to presumption on lapse, see *Phillips v. Brazeal*, 14 Ala. 746. For as to the liability of sureties in the second or substituted bond, the gravamen of the breach may be, not a prior misapplication, but the failure to pay over. *Pinkstaff v. People*, 59 Ill. 148; *Morris v. Morris*, 9 Heisk. 814.

<sup>3</sup> *Loring v. Bacon*, 3 Cush. 465; *Enicks v. Powell*, 2 Strobb. Eq. 196; *Lingle v. Cook*, 32 Gratt. 262; *Wood v. Williams*, 61 Mo. 63; 74 Mo. 154; 79 P. 806 (N. Mex., unoff. rep.). And see *People v. Curry*, 59 Ill. 35; *Lacoste v. Splivalo*, 64 Cal. 35, 30 P. 571.

The remedies for breach of an executor's or administrator's bond will be considered hereafter. And see general works on bonds, and the relation of principal and surety. Co-sureties may stand liable together towards the court and those for whose benefit the obligation was taken, but as among themselves unequally responsible.

<sup>4</sup> See *Tanner v. Mills*, 50 Ala. 356.

## CHAPTER VI.

## APPEAL, REVOCATION; NEW APPOINTMENT, ETC.

150. **Appeal from the decree of the county or district probate court is regulated**, in England and the United States, by local statutes, varying from time to time, which need not be examined here at length.<sup>1</sup> In most American States the supreme judicial court of common law is also the supreme court of probate and equity, and hence, a ready appeal is taken from the county probate court, by any one aggrieved by its decree, with, perhaps, the intervention of a jury.<sup>2</sup>

151. **The right to appeal depends upon the relation of the appellant to the subject-matter of the probate decree or order.** A person is aggrieved, within the meaning of our practice acts, when his rights are concluded or in some way affected by such decree or order; nor is it essential that he was directly connected with the proceedings below.<sup>3</sup>

<sup>1</sup> Wms. Exrs. 571, 572, citing English stats. 24 Hen. VIII, c. 12; 25 Hen. VIII, c. 19; 3 & 4 Wm. IV, c. 92. Appeal to House of Lords. 20 & 21 Vict. c. 77.

<sup>2</sup> *Supra*, 1. This right to appeal, being a statutory right, can only be secured by a strict compliance with the statute conditions. *Dennison v. Talmage*, 29 Ohio St. 433. To such higher tribunal, therefore, intermediate or final, any person aggrieved by the order, sentence, decree, or denial of the court or judge taking primary jurisdiction of the case, may appeal. This appeal has sole reference, however, to the order or decree in question, as, for instance, in admitting such a will to probate and issuing such letters testamentary, or in granting such letters of administration; and judgment on appeal being upon such decree, order, sentence, or denial of the court below, it is certified to that tribunal, where further proceedings are had accordingly, or stopped, as if it had made no decision. The judgment of the appellate tribunal is to be carried into effect by the probate court, whose jurisdiction over the cause and the parties, is not taken away by the appeal. *Metcalf, J., in Dunham v. Dunham*, 16 Gray, 577; *Curtiss v. Beardsley*, 15 Conn. 523. Appellate court does not grant new letters. *Wooten's Estate*, 85 S. W. 1105, 114 Tenn. 289. And see *Farnham's Estate*, 41 Wash. 570, 84 P. 602; *Thompson v. Tracy*, 60 N. Y. 174. The probate court cannot revoke its decree of appointment pending an appeal. 55 N. J. Eq. 764, 37 A. 952. Nor appoint any one else, except for the special and temporary exigency. 134, 135. But if a will is found, it may revoke administration. *Crocker v. Crocker*, 84 N. E. 476, 198 Mass. 401. And see *Gurdy, Re*, 63 A. 322, 101 Me. 73.

By modern practice, since the whole jurisdiction now vests in the temporal courts, appeal has become the regular mode of procedure before a higher tribunal, wherever the grievance was based upon a decree of the probate court. *State v. Mitchell*, 3 Brev. (S. C.) 520. Yet mandamus or prohibition might lie if the probate judge refused to entertain a proper petition or to decide at all upon the case, or if he obstructed an appeal from his decision. *State v. Castleberry*, 23 Ala. 85; *Gresham v. Pyron*, 17 Geo. 263; *Williams v. Saunders*, 5 Coldw. 60. Mandamus formerly issued against the spiritual courts, in English practice. Wms. Exrs. 235, 387, 435. Or a prohibition. *Ib.* 585; 1 Freem. 372.

<sup>3</sup> See *Livermore v. Bemis*, 2 Allen, 394; 11 Met. 390; *Cleveland v. Quilty*, 128 Mass. 578; *Cheever v. Judge*, 45 Mich. 6, 7 N. W. 186 (executor as against the beneficiaries

152. The probate court may revoke or vacate its own decrees improperly rendered; thereby correcting errors such as arise out of fraud or mistake, cancelling letters which had been issued without jurisdiction, revoking an appointment granted to the wrong party, and admitting a subsequent will or codicil notwithstanding the improper probate of an earlier one. Such jurisdiction is available even after the time of appealing from the decree is past.<sup>1</sup>

153. There are various grounds upon which revocation is proper.<sup>2</sup>

combined); 96 P. 792, 8 Cal. App. 254 (public administrator or non-resident heirs); 77 N. E. 305, 37 Ind. App. 449. See Gurdy, *Re*, 63 A. 322, 101 Me. 73 (appeal from refusal to grant letters of executorship). On appeal, issues of fact, such as the due execution of a will, may be tried by a jury. 1 Bradf. (N. Y.) 200; Thompson v. Tracy, 60 N. Y. 174; Worthington v. Gittings, 56 Md. 542. The practitioner should consult the local statute and procedure of his own State on this general subject. English rules of court, regulating appeals from probate court, may be compared in Wms. Exrs. 574. An appeal is usually restricted to the matters stated as cause for such appeal. 165 Mass. 240, 43 N. E. 98. As to a special administrator, whose appointment is appealed from, see *ante*, 135. But appeal may be taken not upon facts alone, but upon some point of law involved in the decree or order rendered below. (1893) P. 16.

A supreme court of equity has sometimes taken jurisdiction to set aside letters of administration or a probate fraudulently procured, or for some other cause. Wallace v. Walker, 37 Ga. 265, 92 Am. Dec. 70. But see Cooper v. Cooper, 5 N. J. Eq. 1.

<sup>1</sup> Waters v. Stickney, 12 Allen, 15 and cases cited; Vance v. Upson, 64 Tex. 266. Proceedings for such revocation or change in the probate decree are conducted upon the same principle as the original petition; notice issues as before to all parties in interest, and an executor or administrator may be cited before the judge, to show cause why the original probate or administration should not be revoked and his letters surrendered accordingly. And from the decree thus rendered, an aggrieved party may take an appeal, as in other instances. *Ib.* And see Wms. Exrs. 571; Curtis v. Williams, 33 Ala. 570; 8 Blackf. 203; 2 Hill (S. C.) 347; 3 Humph. 142; 7 Blackf. 529; Cleveland v. Quilty, 128 Mass. 578; Scott v. Crews, 72 Mo. 261; Munroe v. People, 102 Ill. 406; Harrison v. Clark, 87 N. Y. 572. Due course of procedure before the probate court requires that the court shall revoke the old probate or administration before or simultaneously with granting a new one. Wms. Exrs. 574, 575; Cro. Eliz. 315; Toller, 126; White v. Brown, 7 T. B. Monr. 446; 2 Robert. 407; Vance v. Upson, 64 Tex. 266.

Where letters were granted in the wrong county, by reason of a last residence of decedent in another county of the same State, the court of rightful jurisdiction should require a revocation of the former letters before granting letters. Coltart v. Allen, 40 Ala. 155, 88 Am. Dec. 757. See 3 N. J. Eq. 559 (statute). Revocation without citation in Rusk v. Hill, 45 S. E. 42, 117 Ga. 722, 97 Am. St. Rep. 217. See 93 N. Y. S. 973.

In case an administrator is irregularly appointed, because of a will presented for probate, the appointment stands until revoked by at least a definitely inconsistent grant. Franklin v. Franklin, 91 Tenn. 119, 18 S. W. 61. And so with an executor duly appointed, though there may be a later will not yet offered in probate. 50 N. J. Eq. 295. See (1894) A. C. 437.

<sup>2</sup> That the letters testamentary or of administration were issued without jurisdiction, inasmuch as the party was still living, or his last residence and *situs* of property conferred the whole jurisdiction elsewhere. Morgan v. Dodge, 44 N. H. 255, 82 Am. Dec. 213; Napier's Goods, 1 Phillim. 83; Hooper v. Stewart, 25 Ala. 408, 60 Am. Dec. 527; 5 Pick. 519, 522; Burns v. Van Loan, 29 La. Ann. 560. See Coltart v. Allen, 40 Ala. 155, 88 Am. Dec. 757. That the will was probated through fraud or error, or that some later will or codicil should be admitted. Wms. Exrs. 576; Waters v.

154. **Removal of an executor or administrator from his office** is now permitted largely by local statute, with due appointment of a successor by the court.<sup>1</sup>

Stickney, 12 Allen, 4; 1 Sm. & M. Ch. 589. But see 64 Tex. 266. That general administration was granted, whereas the deceased died testate. 10 Md. 52; 2 Bradf. (N. Y.) 281; 77 Ala. 323; Dalrymple v. Gamble, 66 Md. 298, 7 A. 683, 8 A. 468. That administration with will annexed was granted regardless of the executor's rights. Thomas v. Knighton, 23 Mo. 318; Patton's Appeal, 51 Penn. St. 465; 4 Yerg. 16. That administration was granted earlier than the statute permits, or to one of a class not preferred therein; or that it was granted to another person than the husband, widow or next of kin, regardless of the legal priorities. 8 Blackf. 203; 113 N. Y. S. 281; Williams' Appeal, 7 Penn. St. 259; 2 Hill (S. C.) 347; Wms. Exrs. 578; 4 Pick. 33; Pacheco, Estate of, 23 Cal. 476; Rollin v. Whipper, 17 S. C. 32; 40 N. J. Eq. 184. That administration was granted to a disqualified person or one not entitled at all. Thomas v. Knighton, 23 Md. 318, 87 Am. Dec. 571; Harrison v. Clark, 87 N. Y. 572; 13 Phila. 296. That the preferred party's renunciation was forged or fraudulently procured. Thomas v. Knighton, 33 Md. 318; Wilson v. Hoes, 3 Humph. 142. See Rinehart v. Rinehart, 27 N. J. Eq. 475. That the judge of probate who granted the letters was an interested party. Coffin v. Cottle, 5 Pick. 480; Echols v. Barrett, 6 Ga. 443. See Whitworth v. Oliver, 39 Ala. 286. That the party having a right to intervene was not cited in nor cognizant of the proceedings. Young v. Holloway, (1895) P. 87; Kerr v. Kerr, 41 N. Y. 272; 3 Halst. Ch. 215; 12 Allen, 15; Wallace v. Walker, 37 Ga. 365; McCaffrey's Estate, 38 Penn. St. 331; 44 N. H. 260, 82 Am. Dec. 213; 45 S. E. 42, 117 Ga. 722, 97 Am. St. Rep. 217. That grant upon the estate of a married woman was made as though she were single. (1893) P. 16. In general, that there was essential fraud, error, or mistake in the original decree and appointment, or that the appointment was without authority of law. 1 Sm. & M. Ch. 589; Com. Dig. Administrator B; 1 Barb. Ch. 302; Broughton v. Bradley, 34 Ala. 694, 73 Am. Dec. 474. Special causes of revocation are suggested by local statutes. 4 Dem. 394. See Floyd v. Herring, 64 N. C. 409; 66 *supra*; McCabe v. Lewis, 76 Mo. 296. If the grant may be considered voidable rather than void, revocation becomes eminently proper in such cases.

It would appear that a probate court may, of its own motion, institute and carry on proceedings to revoke its irregular decrees. 77 Ala. 323. As a rule, the private party who, as of right, seeks revocation of an appointment, because some preferred party was passed over, should be of that class himself, and in a position to profit by such revocation. 2 Jones (N. C.) L. 387; 1 How. (Miss.) 217; 2 Brev. 167. And see Hardaway v. Parham, 27 Miss. 103; Kelly v. West, 80 N. Y. 139. A debtor cannot thus proceed. 1 Dem. 163. It should be borne in mind that the right to be cited in does not necessarily render an appearance indispensable; and that in granting administration, the failure of one entitled to the trust in preference may often be concluded by his waiver or the failure to seasonably apply or to qualify. Busb. (N. C.) L. 242; Cold v. Dial, 12 Tex. 100; *supra*, 112. See Hutchinson v. Priddy, 12 Gratt. 85. A regular appointment should not be revoked because parties in priority, once concluded by their own acts or laches, seek without special good reason to assert such priority afterwards. See Sharpe's Appeal, 87 Penn. St. 163; Ehlen v. Ehlen, 64 Md. 360; Dietrich's Succession, 32 La. Ann. 127. A judge may select one or more from the class primarily entitled; but having exercised his discretion, he ought not to revoke without good cause. Brubaker's Appeal, 98 Penn. St. 21.

That the occasion for a limited or special administration has ceased to exist is good cause for revocation or supersedure. Morgan v. Dodge, 44 N. H. 260, 82 Am. Dec. 213; 64 Md. 359. The failure to qualify by bond in the first instance appears sometimes to be regarded as cause for revocation; but usually the more correct view is, that the condition precedent failing, there is no appointment to be revoked, but rather a supplementary decree of suitable tenor to be entered. Morgan v. Dodge, 44 N. H. 261, 82 Am. Dec. 213. Removal may sometimes reach this case. And see 5 Sm. & M. 245; 10 La. Ann. 94; 95 N. C. 353; 155.

<sup>1</sup> Mass. Gen. Stats. c. 101, § 2; c. 100, § 8. See 72 Cal. 335. Moreover, statute provision is made for the summary removal of an executor or administrator who, upon

being ordered by the probate court to give a new bond, does not seasonably comply with the order. Mass. Gen. Stats. c. 101, § 17; *Morgan v. Dodge*, 44 N. H. 261, 82 Am. Dec. 213; 1 La. Ann. 20; 4 J. J. Marsh. 60; *McFadgen v. Council*, 81 N. C. 195; *Bills v. Scott*, 49 Tex. 430. And inexcusable negligence to file an inventory or settle one's accounts in court, after having been duly cited, is sometimes specified as proper cause for removal. See Mass. Gen. Stats. c. 101, § 2; c. 99, § 26. And see *Thayer v. Homer*, 11 Met. 104; *Wright v. McNatt*, 49 Tex. 425.

It is perceived that statutes of this character confer upon the court, and most appropriately, too, a broad discretion as to the various instances which may justify removal. Whenever, from any cause, the executor or administrator becomes unable to perform properly the substantial duties of his office, he may be regarded as "evidently unsuitable." As to insanity, see 68 Cal. 281; 4 Dem. 81. Unsuitableness may be inferred also from wilful misconduct, or even from obstinate persistency in a course plainly injurious to the interests of the estate, and impairing its value; and in fact, as a rule, any unfaithful or incompetent administration, which will sustain an action on one's probate bond, should be sufficient cause for his removal. *Andrews v. Tucker*, 7 Pick. 250; 28 La. Ann. 784; *Foltz v. Prouse*, 17 Ill. 487; 14 Barb. 658; *Thayer v. Homer*, 11 Met. 104; *Hussey v. Coffin*, 1 Allen, 354; 148 Mass. 248, 19 N. E. 370; 3 Nev. 93, 93 Am. Dec. 376; 83 Ind. 501; 104 N. Y. 103, 10 N. E. 35. And see *Peale v. White*, 7 La. Ann. 449; *Reynolds v. Zink*, 27 Gratt. 29; 64 Md. 399, 2 A. 1; 4 Dem. 227; *Kellberg's Appeal*, 86 Penn. St. 129; *Newcomb v. Williams*, 9 Met. 525; *Freeman v. Kellogg*, 4 Redf. (N. Y.) 218; 40 Hun. 291; *Gray v. Gray*, 39 N. J. Eq. 332, 137 Mass. 547; 3 Dem. 542; 63 Tex. 396; 37 N. J. Eq. 535.

But it is no cause for removal that the executor or administrator declines to aid heirs or others outside the line of his official duty or exercises a rightful discretion. *Richards v. Sweetland*, 6 Cush. 324. See further, *Myrick Prob. 97*; *Harris v. Seals*, 29 Ga. 585; *Andrews v. Carr*, 2 R. I. 117; *Gregg v. Wilson*, 24 Ind. 227; 1 Dem. 577. Opportunity to file accounts and inventory should be given if this be the grievance alleged; the court ordering him to account. 28 La. Ann. 800; 108 Ill. 403. Cf. 77 N. C. 360; 62 S. E. 549, 148 N. C. 461. As to his bankruptcy, or insolvency, see *Dwight v. Simon*, 4 La. Ann. 490; *Cooper v. Cooper*, 5 N. J. Eq. 9; 33, 104; *Gibson v. Maxwell*, 85 Ga. 235, 11 S. E. 615. As to transactions by the executor or administrator, not perhaps justifiable, but held insufficient cause for his removal, see *Carpenter v. Gray*, 32 N. J. Eq. 692; 18 S. C. 396; *Killam v. Costley*, 52 Ala. 85. And see *Randle v. Carter*, 62 Ala. 95; *Haight v. Brisbin*, 96 N. Y. 132. As to removing, after ordering another bond, see 38 N. J. Eq. 490.

The causes of removal are discussed in many recent cases, turning largely upon statute construction of such words as "unsuitable," etc. And see *supra*, 104-109. See e.g., (1) removal justified. 31 So. 491, 132 Ala. 233; 66 P. 175 (Cal.); 74 N. Y. S. 33; *Marks v. Coats*, 62 P. 488, 37 Or. 609; 81 N. Y. S. 791; *Collins v. Carr*, 38 S. E. 346, 112 Ga. 868; *Scott v. Smith*, 82 N. E. 556 (Ind. App. 1907); 105 N. Y. S. 1141 ("graft"); *Frothingham v. Petty*, 64 N. E. 270, 197 Ill. 418; 85 N. E. 774, 171 Ind. 453. (2) Removal not justified. *Claney v. McElroy*, 70 P. 1095, 30 Wash. 567; *Healy's Estate*, 70 P. 455, 137 Cal. 474; 46 So. 784, 121 La. 721; *Odlin v. Nichols*, 69 A. 644, 81 Vt. 219; 41 So. 206, 116 La. 912; 75 N. Y. S. 1058; 104 N. Y. S. 29; 105 N. Y. S. 303 (material question of fact not investigated). Sound discretion of probate court is favored on appeal. *Bell's Estate*, 67 P. 123, 135 Cal. 194. Causes of unsuitableness, operating at the time of the appointment, but disclosed more fully in the course of administration, and upon experiment, may afford the ground of one's subsequent removal from office; the point here being, not that the unsuitableness operated when the appointment was made, but that it operates at the time of the complaint. 74 N. E. 317, 188 Mass. 201; *Drake v. Green*, 10 Allen, 124. Cf. *Lehr v. Turball*, 3 Miss. 905.

Non-residence or the permanent absence of an executor or administrator is made a specific cause of removal by our local statutes under various circumstances showing detriment to the estate; as where one moves out of the State without having settled his accounts, or without appointing an attorney, or, as held in some States, if he be a non-resident at all. Mass. Gen. Stats. c. 101, § 2; *Harris v. Dillard*, 31 Ala. 191; local codes. See *Walker v. Torrance*, 12 Ga. 604; *McDonogh, Succession of*, 7 La. Ann. 472; 4 Dem. 492; *Wiley v. Brainerd*, 11 Vt. 107; *Cutler v. Howard*, 9 Wis. 309; 81 P. 1061, 39 Wash. 520. But removal from the jurisdiction does not *ipso facto*



155. **As to procedure, one regularly appointed** is not bound to propound his interest until the party calling it in question has established his own position.<sup>1</sup> An executor or administrator removed from office should settle his accounts in court and turn over the estate to his successor without delay; otherwise, he and his sureties may be pursued.<sup>2</sup> Discharge from office relieves from further responsibility, but not from the consequences of malfeasance and neglect while in office.<sup>3</sup>

156. **Resignation from office, by way of favor to the incumbent,** or as a gentler means of vacating an office unsuitably filled, our statutes further provide, the court exercising due discretion.<sup>4</sup> The correct settlement of one's accounts, and transfer of the balance as the court may direct, is the condition upon which resignation is permitted.<sup>5</sup>

operate a revocation of letters; for due proceedings for making a vacancy should be instituted. *Hooper v. Scarborough*, 57 Ala. 510; *Railroad Co. v. McWherter*, 53 P. 135, 59 Kan. 345; *McKnight, Re*, 71 N. E. 1134, 179 N. Y. 522; 51 A. 1050, 24 R. I. 35; *McCreary v. Taylor*, 38 Ark. 393; 30 Ark. 198. As to suspension, under local statute, see 122 Cal. 379.

Statutes deal with the marriage of a sole executrix or administratrix. 4; *Whitaker v. Wright*, 35 Ark. 511; *Duhme v. Young*, 3 Bush, 343; *Kavanaugh v. Thompson*, 16 Ala. 817; *Teschemacher v. Thompson*, 18 Cal. 211; *Frye v. Kimball*, 16 Mo. 9; *Yates v. Clark*, 56 Miss. 212; 70 Cal. 343, 11 P. 651; 94 Cal. 357, 29 P. 774; 33 So. 827, 135 Ala. 322.

<sup>1</sup> *Phillim*, 155, 166; *Pettingill v. Pettingill*, 60 Me. 419; *Vail v. Givan*, 55 Ind. 59. An executor or administrator is entitled to notice and a reasonable opportunity to appear and defend before he can be properly removed or his letters revoked. *Murray v. Oliver*, 3 B. Mon. 1. Unless he waives his right. *Ferris v. Ferris*, 89 Ill. 452. And see 5 Sm. & M. 245 (fair time to file bond). At the hearing for his removal, as well as for the revocation of a probate decree, both petitioner and respondent may offer evidence pertinent to the issue; and either party may appeal from the decree of the court making or refusing to make the removal. See *Smith (Mass.) Prob. Pract.* 99; *Bailey v. Scott*, 13 Wis. 618. The local statute usually enters fully into the details of such proceedings. 12 La. Ann. 611; *Neighbors v. Hamlin*, 78 N. C. 42. As to implied revocation, see *Berry v. Bellows*, 30 Ark. 198; *Bailey v. Scott*, 13 Wis. 618. But the more correct practice discountenances implied revocations. See *supra*, 152. And see *McCauley v. Harvey*, 49 Cal. 497; *Turner v. Wilkins*, 56 Ala. 173.

<sup>2</sup> *Aldridge v. McClelland*, 34 N. J. Eq. 237; *West v. Waddill*, 33 Ark. 575; 2 Brews. (Pa.) 397; *Hood, Re*, 104 N. Y. 103, 10 N. E. 35. And see 68 Hun. (N. Y.) 114.

<sup>3</sup> *Union Bank v. Poulson*, 31 N. J. Eq. 239. See 64 Ala. 545.

<sup>4</sup> See *Thayer v. Homer*, 11 Met. 144; local codes; *Haynes v. Meek*, 10 Cal. 110, 70 Am. Dec. 703; *Carter v. Anderson*, 4 Ga. 516; *Coleman v. Raynor*, 3 Cold. (Tenn.) 25; *Morgan v. Dodge*, 44 N. H. 258, 82 Am. Dec. 213. An executor or administrator already qualified, sometimes is permitted to resign before taking actual possession of the assets. *Comstock v. Crawford*, 3 Wall. 396, 18 L. Ed. 34. See also 81 P. 1061, 39 Wash. 620; 38 S. E. 346, 112 Ga. 912; 3 Hagg. 216; *Wms. Exrs.* 276, 281. And see *Mitchell v. Adams*, 1 Ired. 298.

<sup>5</sup> Where there is a personal trust reposed in an executor under the will, he should not be discharged until he has performed that duty; nor, in general, should the interests of the estate be disregarded. *Lott v. Meacham*, 4 Fla. 144; 1 Barb. Ch. 565; 4 Dem. 162; 14 Atl. 808.

157. Revocation of letters or a probate appears to be a different thing from the creation of a vacancy in the office by death, removal, or resignation, though the books do not keep this distinction clear.<sup>1</sup>

158. The death of an executor or administrator, leaving his trust unperformed, gives occasion, of course, to the appointment of a successor; and death in any event terminates his own functions; his estate continuing liable for any maladministration on his part while in office, and its legal representative rendering a final account.<sup>2</sup>

159. An executor or administrator cannot, by delegation of his own authority, avoid any of the liabilities imposed on him by law.<sup>3</sup>

160. Concerning the legal effect of the revocation of probate or letters on the intermediate acts of the former executor or administrator, a distinction is made in the books between grants void and voidable. A grant utterly void and without jurisdiction, as in the case of administration upon the estate of a living person, gives no shelter to the acts of the appointee; and revocation in such case appears to be only for the sake of correcting the records and preventing further mischief.<sup>4</sup> Where, however, the grant was

<sup>1</sup> As a general rule, where the probate court has once regularly conferred the appointment, it cannot remove the incumbent afterwards except on due procedure for causes defined by statute. *Muirhead v. Muirhead*, 6 Sm. & M. 451; *Levering v. Levering*, 64 Md. 399, 2 A. 1. See 102 Penn. St. 258. And see 63 Cal. 473. As to due procedure for discharging one who wishes to resign, see 50 Mich. 22, 14 N. W. 684; 67 Ga. 227; 37 N. J. Eq. 521. Nor can an executor or administrator, who has once fully accepted and entered upon his trust, resign it unless the statute permits him to; for the old rule always discountenanced such a practice, as to these and similar fiduciaries. *Wms. Exrs.* 281; 1 Hill (S. C.) Ch. 59; *Sears v. Dillingham*, 12 Mass. 358; *Sitzman v. Pacquette*, 13 Wis. 291; *Washington v. Blunt*, 8 Ired. Eq. 253. Other courts, therefore, having equity powers must incline to exercise them in restraint of the probate appointee, where the probate courts have no plenary jurisdiction to remove or accept the resignation of an executor or administrator. *Long v. Wortham*, 4 Tex. 381; 4 C. E. Green, 159; *Cooper v. Cooper*, 5 N. J. Eq. 9; *Bower v. Phillips*, (1897) 1 Ch. 174. So, too, English practice appears to enlarge the right of revocation, in default of the power to remove. *Wms. Exrs.* 579 (e.g., insane executor). Yet revocation seems properly to involve in probate the idea of vacating that which was originally void or voidable and clogged at the outset. But in our later practice the court of original probate jurisdiction is the most suitable tribunal in the first instance for revoking such appointments, for removing or accepting resignations, and, in general, for regulating the succession in the office of executor or administrator; and to such courts our statute authority chiefly relates. *Waters v. Stickney*, 12 Allen, 15; *Ledbetter v. Lofton*, 1 Murph. (N. C.) 224; *Hosack v. Rogers*, 11 Paige, 603; 3 Grant (Pa.) 289; *Wilson v. Frazier*, 2 Humph. 30. Cf. *Leddell v. Starr*, 4 C. E. Green, 159.

<sup>2</sup> See 13 La. Ann. 513.

<sup>3</sup> Supersedure distinguished. See *Driver v. Riddle*, 8 Port. (Ala.) 343; *Bird v. Jones*, 5 La. Ann. 645.

<sup>4</sup> *Jochumsen v. Suffolk Savings Bank*, 3 Allen, 87; *Burns v. Van Loan*, 29 La. Ann. 560; *Moore v. Smith*, 11 Rich. 569, 73 Am. Dec. 122; *Devlin v. Commonwealth*, 101 Penn. St. 273, 47 Am. Rep. 710; *Scott v. McNeal*, 154 U. S. 34, 38 L. Ed. 896. But a decree of distribution may sometimes protect a *bona fide* representative in such cases. 84 Md. 557. The grant of administration on the estate of a decedent, while a last will was in existence, being for a time concealed, has been treated as void with

voidable only, as in case letters of administration are issued by a competent court to a party not entitled to priority, and without citation of those so entitled or their renunciation, all the lawful and usual acts of the appointee performed meanwhile, and not inconsistent with his grant, shall stand good until the authority is revoked.<sup>1</sup> The safer doctrine is, that the letters and grant issued from the probate court shall not be attacked collaterally where the court had jurisdiction at all, and least of all by common-law courts; and that honest and beneficial acts of the representative *de facto* shall bind the estate and innocent third parties.<sup>2</sup>

similar consequences; and so as to letters under a forged or invalid will. See *Plowd.* 276; *Wms. Exrs.* 586, 587; 5 B. & Ald. 744. But cf. *Shephard v. Rhodes*, 60 Ill. 301 (ancillary letters). A similar fatal consequence has been held to attend the grant of letters by an interested judge, contrary to statute. 3 Cush. 352; *Aldrich, Appellant*, 110 Mass. 193; *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114. As to a will admitted to probate but declared void on appeal, see *Smith v. Stockbridge*, 39 Md. 640; 3 Ired. 557. And see *Elgutter v. Missouri R.*, 53 Neb. 748, 74 N. W. 255; 66 N. E. 119, 173 N. Y. 435 (collusive bringing in of assets for a local grant); 61 A. 573, 212 Penn. 57; 57 N. E. 83, 162 N. Y. 513; *Beach's Appeal*, 55 A. 596, 76 Conn. 118. The sale or collection of one's property under such circumstances, by the wrongful representative, may (subject to the usual exceptions in favor of *bona fide* third parties, and negotiable instruments) be avoided by the living person who was supposed dead, or, as the case may be, by the rightful representative of his estate duly appointed; trover or detinue for the property may be maintained, or assumpsit for the money produced (the tort being waived), as so much money received to the use of the rightful party. 2 Ld. Raym. 1216; *Woolley v. Clark*, 5 B. & Ald. 744; 4 B. & Ad. 638; *Wms. Exrs.* 587; *Ellis v. Ellis*, (1905) 1 Ch. 613. Nor is it certain how far the defendant thus sued shall be permitted to recoup, by way of offset. *Wms. Exrs.* 271, 588.

<sup>1</sup> *Wms. Exrs.* 588; *Kelly v. West*, 80 N. Y. 139; *Pick. v. Strong*, 26 Minn. 303.

It has been laid down, and quite broadly, that a payment *bona fide* made to any *de facto* executor or administrator, appointed by a court of competent jurisdiction, will discharge the debtor. *Allen v. Dundas*, 3 T. R. 125; *Best, J. in Woolley v. Clark*, 5 B. & Ald. 746; *Wms. Exrs.* 590; 14 Wyo. 101, 82 P. 577; 88 N. C. 384, 392. And so, perhaps, as to other beneficial acts under an invalid grant performed in good faith. 8 N. H. 98; *Kane v. Paul*, 14 Pet. 33, 10 L. Ed. 341; 4 Ohio, 138, 19 Am. Dec. 591. Statutes now in force confirm and enlarge such a rule. Stat. 20 & 21 Vict. c. 77; *Wms. Exrs.* 591, 592; *Hood v. Barrington*, L. R. 6 Eq. 222. English and American statutes in modern times aim to correct the legal mischief of overturning acts performed in good faith and pursuant to a probate or letters of appointment afterwards set aside for cause. *Wms. Exrs.* 592; *McFeely v. Scott*, 128 Mass. 16; 3 Wash. C. C. 122; Act, 20 & 21 Vict. c. 77. And the rule to be favored at the present day is that, apart from the right to recoup, all acts done in the due and legal course of administration are valid and binding on all interested, even though the letters issued by the court be afterwards revoked or the incumbent discharged from his trust. 1 Bailey (S. C.) 221, 19 Am. Dec. 672; *Brown v. Brown*, 7 Oreg. 285; *Shephard v. Rhodes*, 60 Ill. 301. See *Rogers v. Hoberlein*, 11 Cal. 120; *Beale v. Hall*, 22 Ga. 431.

As between revocation of an appointment and the creation of a vacancy by death, removal, or resignation, it would appear on principle that, in the former instance, further proceedings are *de novo*, giving rise to an original appointment by new letters; while, in the latter, there arises successorship, and the proper appointment for the vacancy should be by letters *de bonis non*. See *Callahan v. Smith*, T. U. P. Chart. (Ga.) 149.

<sup>2</sup> *Peters v. Peters*, 8 Cush. 542; *Wms. Exrs.* 549; 2 Vern. 76; 3 T. R. 125; *Boody v. Emerson*, 17 N. H. 577; *Clark v. Pishon*, 31 Me. 503; *Naylor v. Moffatt*, 29 Mo. 126; 9 Leigh, 119 33 Am. Dec. 227; *Morgan v. Locke*, 28 La. Ann. 806; *Taylor v. Hosick*,

161. The usual effect of an appeal from probate, or from one's appointment as executor or administrator, is to suspend the authority conferred by such appointment; and pending such appeal, and until termination of the controversy, it is a special administrator, if any appointee, who should protect the estate.<sup>1</sup> An appeal by

13 Kan. 518; *Hart v. Bostwick*, 14 Fla. 162; 62 Ala. 261; *Pick v. Strong*, 26 Minn. 303; *Wright v. Wallbaum*, 39 Ill. 554; 59 Kan. 345, 53 P. 135; *Bradley v. Missouri R.*, 51 Neb. 653, 66 Am. St. Rep. 473, 71 N. W. 282; *Strong's Estate*, 119 Cal. 663, 51 P. 1078; 51 Neb. 596, 71 N. W. 283. And especially not by a person not "interested" in legal contemplation. *Taylor v. Hosick*, 13 Kan. 518. In collateral proceedings a probate court may disincline to treat the letters issued as void on merely defective recitals. 146 Ill. 40. Statutes extend this principle to cases where there was no jurisdiction, provided no want of jurisdiction appear of record; thus, in fine, discouraging collateral issues of fact upon a grant of authority which appears regular on its face, and making such decrees voidable, in effect, until vacated, and not utterly void, if at all events there was a dead person's estate. *McFeely v. Scott*, 128 Mass. 16; *Record v. Howard*, 58 Me. 225; 30 So. 510, 127 Ala. 411; *Salomon v. People*, 61 N. E. 83, 191 Ill. 296; 38 S. E. 634, 60 S. C. 401, 54 L. R. A. 660; 49 S. E. 775, 121 Ga. 798; 110 S. W. 594, 86 Ark. 186 (appointment regular on face); 87 P. 841, 44 Wash. 513; 110 N. W. 198, 130 Wis. 419; 65 N. E. 62, 182 Mass. 205; 70 P. 369, 65 Kan. 484, 93 Am. St. Rep. 299. Presumption favorable here to regularity. *McKenna v. Cosgrove*, 83 P. 240, 41 Wash. 332. And a similar rule applies to the probate decree which discharges an appointee or revokes his appointment. *Simpson v. Cook*, 24 Minn. 180; *Bean v. Chapman*, 62 Ala. 58; *Frothingham v. Petty*, 64 N. E. 270, 197 Ill. 418.

But the grant of letters by a local probate court, having no jurisdiction of the person or subject-matter, will not bind the competent probate tribunal. 2 Leigh, 719; *King's Estate*, 105 Iowa, 320, 75 N. W. 187. The conclusiveness of probate decrees is deducible from such exclusive jurisdiction as may be conferred by local statute upon probate courts to decide on the validity of wills, to grant administration, and to supervise the settlement of the estates of deceased persons. *Waters v. Stickney*, 12 Allen, 3, 90 Am. Dec. 122; *Stearns v. Wright*, 51 N. H. 609; *Veach v. Rice*, 131 U. S. 293, 33 L. Ed. 163. That the administrator appointed was not a citizen is not good ground of collateral attack. 67 Ga. 103. Nor generally, if the judge has acted within his jurisdiction as to subject-matter, can the validity of the letters be thus impeached. And see 12 Or. 108, 6 P. 456. The rule sometimes stated is that, whatever may be the immunity of letters of administration against attacks from strangers, parties interested may always object to the want of jurisdiction in the court which issued them. *Breen v. Pangborn*, 51 Mich. 29, 16 N. W. 188.

One sued by an administrator is not authorized to petition the probate court to revoke the plaintiff's letters. *Missouri Pacific R. v. Jay*, 53 Neb. 747, 74 N. W. 259; 107 Iowa, 384, 77 N. W. 1058. Nor can he set up collaterally that such administrator was a minor, hence improperly appointed. *Davis v. Miller*, 109 Ala. 589, 19 So. 699; *Railway Co. v. McWhorter*, 59 Kan. 345, 53 P. 135; 2 Campb. 389; *Carroll v. Carroll*, 60 N. Y. 125. The probate or grant is conclusive upon all persons interested, whether infants, persons insane, or absentees; provided citation was duly granted in the premises and no appeal is taken. *Wms. Exrs.* 565; 86 Md. 623, 39 A. 423. But the probate of a will, while stamping it as authentic and originally valid, does not interpret the document. *Holman v. Perry*, 4 Met. 492, 497; *Fallon v. Chidester*, 46 Iowa, 588, 26 Am. Rep. 164; *Fuller, Ex parte*, 2 Story, 332. Nor does the legal conclusiveness attaching to probate decrees prevent proof, in a collateral suit, that the pretended decree in question was a forgery, or that the alleged appointment has been revoked; for this is to affirm what is of genuine probate record. *Lloyd v. Finlayson*, 2 Esp. 564; *Newman v. Jenkins*, 10 Pick. 515; *Wms. Exrs.* 560, 563; 1 Stra. 560. See *Anderson v. Anderson*, 178 Ill. 160, 52 N. E. 1038. See further, *Wirt v. Pintard*, 40 La. Ann. 233; 4 So. 14; 70 Tex. 538, 7 S. W. 789.

<sup>1</sup> *Wms. Exrs.* 588. Cf. *Bryn v. Fleming*, 3 Head, 658.

the executor or administrator from a decree revoking his authority leaves him, of course, without authority and suspended in his functions.<sup>1</sup> The appeal should conform to objections raised below.<sup>2</sup>

161a. **After revocation or the removal of an executor or administrator**, or the acceptance of his resignation, he cannot complete a sale which he had been negotiating on behalf of the estate; nor collect assets; nor carry on or defend a suit in his official capacity; nor in general exercise the functions of his late office.<sup>3</sup>

<sup>1</sup> *Thompson v. Knight*, 23 Ga. 399; 86 Cal. 72.

<sup>2</sup> See 131 N. Y. 587.

<sup>3</sup> *Owens v. Cowan*, 7 B. Mon. 152; 5 Sm. & M. 130 (enjoined in chancery); *Wiggin v. Plummer*, 31 N. H. 251; *National Bank v. Stanton*, 116 Mass. 435. See local statute. Cf. *Starr v. Willoughby*, 75 N. E. 1029, 218 Ill. 485, 2 L. R. A. (N. S.) 623.

## CHAPTER VII.

## FOREIGN AND ANCILLARY APPOINTMENTS.

162. The subject of foreign and ancillary appointments is considered frequently, in connection with administration of the estates of deceased persons, in the United States; but seldom, comparatively speaking, in England. There probate jurisdiction is always domestic, save as to colonies and foreign countries; but here it is strictly domestic only in pertaining to some particular State. Domestic probate jurisdiction is here internal, in other words, either as respects other States in the same federal Union, or other countries.<sup>1</sup>

163. Regarding the fundamental rules of comity, principal administration is properly that of the country or State only where the deceased person had his last domicile; administration taken out elsewhere, in the country or State where assets were locally situate, being known as *ancillary* (that is to say, auxiliary or subordinate) administration. Peculiar rules guide the court with respect to the character and method of making the ancillary appointment.<sup>2</sup>

164. (1) Letters granted abroad confer, as such, no authority to sue or be sued, or to exercise the functions of the office in another jurisdiction; though they may afford ground for specially conferring a probate authority within such other jurisdiction; and the same person sometimes qualifies as principal and ancillary representative.<sup>3</sup>

<sup>1</sup> *Supra*, 15-20.

<sup>2</sup> 11 Mass. 256; *Merrill v. N. E. Mut. Life Ins. Co.*, 103 Mass. 245, 4 Am. Rep. 548; *Clark v. Clement*, 33 N. H. 567; *Childress v. Bennett*, 10 Ala. 751, 44 Am. Dec. 503.

<sup>3</sup> Hence, letters testamentary granted to an executor in one State or country have no extra-territorial force. *Enohin v. Wylie*, 10 H. L. Cas. 19; 6 App. Cas. 34, 39; 66 P. 846, 135 Cal. 7 (grant of ancillary letters discretionary); 2 Cl. & Fin. 84; *Wms. Exrs.* 362; *Kerr v. Moon*, 9 Wheat. 565; 5 Greenl. 261, 17 Am. Dec. 228; 135 Fed. 668; 2 Pet. 239, 7 L. Ed. 410; *Trecothick v. Austin*, 4 Mas. 16, 3 Am. Dec. 189; *Patterson v. Pajan*, 18 S. C. 584; *Naylor v. Moffatt*, 29 Mo. 126; *Gilman v. Gilman*, 54 Me. 453; 15. And an administrator has no authority beyond the limits of the State or country in which he was appointed. 3 Mas. 469; 19 La. Ann. 41; 1 Pick. 81, 11 Am. Dec. 149; 47 So. 45; 5 J. J. Marsh. 280, 22 Am. Dec. 33; 6 Johns. Ch. 353, 10 Am. Dec. 340; 5 Vt. 333; *Willard v. Hammond*, 21 N. H. 382; 13 Mo. 480; *Smith v. Guild*, 34 Me. 443; 1 Ohio, 519, 13 Am. Dec. 640; 1 Rich. 116; *Sheldon v. Rice*, 30 Mich. 296, 18 Am. Rep. 136. In either case one must be confirmed in his authority by the courts or legislature of the State or country in which property is situated or debts are owing, before he can effectually administer the property or collect the debts there. For the rights of citizens in the local jurisdiction must be protected. *Wilkins v. Ellett*, 108 U. S. 256, 258, 27 L. Ed. 718.

165. (2) **Each independent sovereignty considers itself competent to confer, whenever there is occasion, a probate authority, whether by letters testamentary or of administration, which shall operate exclusively and universally within its own sovereign jurisdiction, there being property of the deceased person, or lawful debts owing, within reach of its own mandate and judicial process.**<sup>1</sup>

166. (3) **But the local sovereignty, State or national, permits letters to issue upon the estates of deceased non-residents, mainly for the purpose of conveniently subjecting such assets to the claims of creditors entitled to sue in the local courts, and for appropriating whatever balance may remain to the State or sovereign, by way of distribution, only in default of known legatees or kindred.**<sup>2</sup>

167. (4) **Administration in the last domicile is principal, as to testates or intestates; and administration, or an appointment granted elsewhere, or because of local property or assets, is ancillary merely.**<sup>3</sup>

168. (5) **But principal letters need not precede the ancillary, since each local sovereignty may act independently of all others in conferring the local grant, out of regard to local convenience, and since what might otherwise be or become ancillary may stand alone.**<sup>4</sup>

<sup>1</sup> *Banta v. Moore*, 15 N. J. Eq. 97; *Naylor v. Moffatt*, 29 Mo. 126; 3 Q. B. 493; 18 Beav. 417; *Price v. Dewhurst*, 4 M. & Cr. 76. And whether the local property shall be remitted abroad is matter of local discretion. *Fretwell v. Lemore*, 52 Ala. 124; *Mackey v. Coxe*, 18 How. (U. S.) 100, 15 L. Ed. 299; *Carmichael v. Ray*, 5 Ired. Eq. 365; *Hughes, Re*, 95 N. Y. 55. In this country such sovereign jurisdiction may apply as between the several States under constitutional limitations, and not merely as to a foreign country.

<sup>2</sup> If, therefore, the non-resident proves to have left legatees and a will whose probate may be established, or kindred lawfully entitled to distribution, or foreign creditors, the rights of all parties thus interested should be respected; and, subject to local demands upon the estate, the local administration and settlement of the estate will be regulated accordingly. *Davis v. Estey*, 8 Pick. 475; *Mitchell v. Cox*, 22 Ga. 32, 68 Am. Dec. 481; *Normand v. Grognaud*, 14 N. J. L. 425.

<sup>3</sup> 3 Met. (Mass.) 109; *Merrill v. N. E. Life Ins. Co.*, 103 Mass. 245, 4 Am. Rep. 548; 10 Ala. 751, 44 Am. Dec. 503; *Perkins v. Stone*, 18 Conn. 270; *Adams v. Adams*, 11 B. Mon. 77; *Spradling v. Pippin*, 15 Mo. 117; *Clark v. Clement*, 33 N. H. 563; 1 Strobh. (S. C.) 25; *Green v. Rugely*, 23 Tex. 539; *Crispin v. Doglioni*, L. R. 1 H. L. 301; *Wilkins v. Ellett*, 108 U. S. 256, 27 L. Ed. 718; 97 Ill. App. 270.

<sup>4</sup> Thus, the will of a non-resident testator need not be proved in the State or country of his last domicile, before the domestic State can grant valid letters upon his estate situated within its local confines. *Bowdoin v. Holland*, 10 Cush. 17; 1 Rand. (Va.) 108. But local intestate letters should not issue, where a foreign testacy is known to exist. *Shepard v. Rhodes*, 60 Ill. 301. See *Walton v. Hall*, 66 Vt. 455, 29 A. 803. Nor is it essential that administration be granted on an intestate estate, in the place of the domicile of the deceased, before an administrator is appointed in another State or country, where, agreeably to local law, administration is proper. 11 Mass. 256; *Pinney v. McGregor*, 102 Mass. 192; *Rosenthal v. Remick*, 44 Ill. 202. And see *Crosby v. Gilchrist*, 7 Dana, 206; *Pond v. Makepeace*, 2 Met. 114.

169. To apply these five propositions to the probate of wills and the grant of letters testamentary. In England, the last domicile of the deceased is firmly respected, in all matters of administration as to personalty.<sup>1</sup> And hence, as between testacy or intestacy, it is held that the courts of the last domicile must determine; and that, so far as personalty is concerned, a will must be executed according to the law of the country where the testator was domiciled at the time of his death.<sup>2</sup>

170. In the United States the same general rules prevail as to probate and executors, subject, however, to much statute regulation. Probate and administration are local, and the foreign executor has no authority as such which local tribunals are bound to obey.<sup>3</sup>

171. A will to be operative must, according to the better authority, conform as a rule to the law of the place of the testator's last

<sup>1</sup> 10 H. L. Cas. 1, cited in *Crispin v. Doglioni*, L. R. 1 H. L. 301. But cf. *Wms. Exrs.* 370, 371; *Di Sora v. Philipps*, 10 H. L. Cas. 633, 639, 640; *United States v. McRae*, L. R. 3 Ch. 86.

<sup>2</sup> *Whicker v. Hume*, 7 H. L. Cas. 124; *Douglas v. Cooper*, 3 Myl. & K. 378; 4 M. & Cr. 76, 82; *Wms. Exrs.* 362, 366. But as regards real estate, the law of local situation is admitted to prevail. 2 Ves. & B. 131; *Freke v. Lord Carbery*, L. R. 16 Eq. 461. Provision of will fails, if conflicting with local land statute. 86 N. E. 245, 236 Ill. 333.

Without an English grant one cannot sue or exercise general authority as to English assets of the estate. But the probate tribunals of England will, in such cases, follow the grant of the court of that foreign country where the deceased died domiciled; and the last will sanctioning his appointment having been authenticated abroad and proved by exemplified copy in the proper English probate court, the latter court will clothe him with the needful ancillary authority to enable him to execute his local functions; *Wms. Exrs.* 370-374; *Enohin v. Wylie*, 10 H. L. Cas. 14. The duly appointed attorney of the person in interest may be selected. *Dost Ali Khan, Goods of*, L. R. 6 P. D. 6. And see 24 & 25 Vict. c. 114, as to will of personalty made with other formalities; *Von Ruseck, Goods of*, L. R. 6 P. D. 211; 27 W. R. 323. See as to Scotch assets, *Sterling-Maxwell v. Cartwright*, L. R. 9 Ch. D. 173; L. R. 11 Ch. D. 522; *Ewing v. Ewing*, 9 App. Cas. 34. As to the will of a foreigner made in England, according to English law, see *Lacroix, Goods of*, L. R. 2 P. D. 97; 24 W. R. 1018.

<sup>3</sup> See *supra*, 164; 138 Mich. 247, 101 N. W. 535; *Tillman v. Walkup*, 7 S. C. 60 (removal of foreign executor). It is now the American practice, fortified by local legislation, for the executor or other person interested in a will, which has been proved and allowed in any other of the United States or in a foreign country, to produce with petition a copy of the will and of the probate thereof, duly authenticated, to the probate court in any county of the domestic State in which there is any estate real or personal upon which the will may operate, or assets. After the will is so allowed and ordered to be recorded, the local court grants letters testamentary or of administration with the will annexed, with a qualification as circumstances may require, and proceeds to the settlement of the estate which may be found in such jurisdiction. See *Beers v. Shannon*, 73 N. Y. 292; 13 Gray, 330; *Parker v. Parker*, 11 Cush. 519; 4 Hun (N. Y.) 7; *Arnold v. Arnold*, 62 Ga. 627; *Butler's Succession*, 30 La. Ann. 887; 66 Vt. 455, 29 A. 803; 89 N. Y. S. 732; 47 So. 45 (Ala.); 45 A. 62, 194 Penn. 251; *Helme v. Sanders*, 3 Hawks, 566. Cf. 8 Jones Law, 187; 37 Ala. 185; *Pope v. Waugh*, 103 N. W. 500, 94 Minn. 502 (waiver of requirement). And see *Loring v. Oakey*, 98 Mass. 267. As to a foreign transcript indicating no adjudication, see *Illinois Central R. v. Crazin*, 71 Ill. 177. See further, *Hooper v. Moore*, 5 Jones L. 130; *Keith v. Proctor*, 114 Ala. 676, 21 So. 602.



domicile.<sup>1</sup> But, by statute, it is now quite frequently provided that a will executed out of the local jurisdiction, in conformity with the law of the place where made, or even of domicile at time of execution, shall effectually prevail within such local jurisdiction.<sup>2</sup>

172. So as to the estates of intestates, administration must be taken out in the State or country where there are assets to be administered, as well as in the country of the intestate's last domicile; for, as we have seen, a local appointment can alone confer local authority.<sup>3</sup>

173. The executor or administrator appointed in one State or country has, therefore, no right of control, as such, over property in another State or country. As to external assets, he cannot interfere.<sup>4</sup> The well-settled rule is that administration operates of right only in the State or country where it was granted, and there may operate exclusively of all foreign appointment; and that, before one can be recognized in a jurisdiction as personal representative of the deceased, he must be clothed with the correspondent

<sup>1</sup> Story Conf. Laws (local bond required), §§ 468, 473; 1 Binn. 336; Stanley v. Bernes, 3 Hagg. 373; 4 Hagg. 346. Cf. 8 Paige, 419; 2 Add. 6, 10.

<sup>2</sup> 24 & 25 Vict. c. 114; 169 *supra*; local State codes. As to proof, see Bayley v. Bailey, 5 Cush. 245. And see Moultrie v. Hunt, 23 N. Y. 394; Irwin's Appeal, 33 Conn. 128. A will need not have been executed according to the law of the State in which ancillary letters are desired, except that a will of real property must conform to the law of local situation. Langbein, *Re*, 1 Demarest, 448.

<sup>3</sup> *Supra*, 22. The right of appointment might well follow the domiciliary interest: yet statutes in force at the place where jurisdiction is taken, practically control the subject. Wms. Exrs. 430; Johnston, Goods of, 4 Hagg. 182; 2 Curt. 241; 1 Hagg. 98; 17 N. F. 310. And see *supra*, c. 3; Hopkins's Appeal, 60 A. 657, 77 Conn. 644. The local statute may apply in general terms to those who die without the State, leaving property within the same to be administered upon, whether the deceased were alien or citizen. 1 Bradf. (N. Y.) 60; Plummer v. Brandon, 5 Ired. Eq. 190; Willing v. Perot, 5 Rawle, 264; Woodruff v. Schultz, 49 Iowa, 430; Piquet, Appellant, 5 Pick. 65; 144 Fed. 248.

<sup>4</sup> He has no power to sue to collect debts or incorporeal personalty in such other State or country; nor, perhaps, to discharge. *Supra*, 164; 8 Ired. Eq. 246; 4 Ill. 118; 15 Pet. 1, 10 L. Ed. 639; 9 Wall. 394, 19 L. Ed. 737; 2 Met. 114; Beaman v. Elliot, 10 Cush. 172; Chapman v. Fish, 6 Hill, 555; McClure v. Bates, 12 Iowa, 77; 72 N. Y. S. 1068; 1 N. H. 193; 1 Brev. 15; 9 Cranch, 151, 3 L. Ed. 687; Brown v. Smith, 64 A. 915, 101 Me. 545, 115 Am. St. Rep. 359; Kerr v. Moon, 9 Wheat. 556, 6 L. Ed. 159; Mansfield v. Turpin, 32 Ga. 260; Union Mutual life Ins. Co. v. Lewis, 97 U. S. 682, 24 L. Ed. 1114; Ferguson v. Morris, 67 Ala. 389; 58 P. 849; Jones v. Cliett, 40 S. E. 719, 114 Ga. 673; 56 S. E. 548, 144 N. C. 44. He cannot control lands so situated. Apperson v. Bolton, 29 Ark. 418; Sheldon v. Rice, 30 Mich. 296, 18 Am. Rep. 136; 16 Neb. 418, 20 N. W. 266. Nor can he be sued or defend a suit as executor or administrator in one State or country by reason of an appointment conferred in another. Jefferson v. Beall, 117 Ala. 436, 67 Am. St. Rep. 177, 23 So. 44; 10 Yerg. 283; 1 Dana, 445; 120 Fed. 718 (U. S. court); 135 Fed. 818; 88 N. W. 765, 63 Neb. 431; 1 Miss. (Walk.) 211; 6 Barb. 429; Norton v. Palmer, 7 Cush. 523; 9 Wheat. 565, 6 L. Ed. 161; Hedenberg v. Hedenberg, 46 Conn. 30, 33 Am. Rep. 10; Patterson v. Pagan, 8 S. C. 584; Sloan v. Sloan, 21 Fla. 589; Sparks v. White, 7 Humph. 86.

probate authority which the sovereignty of that jurisdiction is competent to confer, or at least must conform to requirements which the local law sees fit to impose.<sup>1</sup> To this rule, however, are exceptions, grounded in comity or favor.<sup>2</sup>

174. **When any surplus remains in the hands of a foreign or ancillary appointee**, after paying all debts in that jurisdiction, the foreign court will, in a spirit of comity and as a matter of judicial discretion, order it to be paid over to the domiciliary executor or administrator, if there be one, instead of making distribution;<sup>3</sup> in

<sup>1</sup> *Turner v. Linam*, 56 Ga. 253; 24 Ga. 356; *Bells v. Nichols*, 38 Ala. 678; *Kansas Pacific R. v. Cutler*, 16 Kan. 568; *Moore v. Fields*, 42 Penn. St. 467; 5 McLean, 4; 2 Blackf. 247; *Rockham v. Wittkowski*, 64 N. C. 464. As to United States District of Columbia, see 4 Cranch, C. C. 368; *Vaughan v. Northup*, 15 Pet. 1, 10 L. Ed. 639.

<sup>2</sup> Some American States permit a foreign executor or administrator qualified abroad to sue for local assets belonging to the estate of the deceased, without qualifying under a local probate appointment; which permission, however, must be strictly followed. If qualified locally according to the laws of that particular State, by probate appointment, special license, or otherwise, he may sue and collect, of course. *Mobart v. Connecticut Turnpike Co.*, 15 Conn. 145; *Crawford v. Graves*, 15 La. Ann. 243; *Naylor v. Moffatt*, 29 Mo. 126; *Banta v. Moore*, 15 N. J. Eq. 97; 70 Cal. 403, 11 P. 833, 59 Am. Rep. 423. Corporations doing business outside the State where chartered are now locally suable. See 111 U. S. 138, 28 L. Ed. 379; 96 U. S. 369, 24 L. Ed. 853; *Railroad Co. v. Harris*, 12 Wall. 65, 20 L. Ed. 354. So have statutes permitted the non-resident executor or administrator to defend local suits on similar terms; or made him subject to suits by attachment or otherwise, at least when the cause of action arose in the local forum. *Moss v. Rowland*, 3 Bush, 505; *Cady v. Bard*, 21 Kan. 667; *Hopper v. Hopper*, 125 N. Y. 400, 26 N. E. 457, 12 L. R. A. 237. As to equity supervision, see 32 Barb. 190; 9 S. & R. 252, 11 Am. Dec. 717; 56 How. (N. Y.) Pr. 232; *Colbert v. Daniel*, 32 Ala. 314; *Patton v. Overton*, 8 Humph. 192; 11 Leigh, 1; *Powell v. Stratton*, 11 Gratt. 792. And local statutes enable foreign executors or administrators to sell or deal with real estate in the local *situs* for due administration purposes, or to transfer local stock, or to perform various other specified acts in the local jurisdiction. 9 Phila. (Pa.) 298; 69 A. 939, 74 N. H. 507; 42 So. 42, 144 Ala. 393; local codes; *Luce v. Manchester R.*, 63 N. H. 588, 3 A. 618.

The executor or administrator appointed in another jurisdiction has been permitted to maintain an action on a judgment there recovered. *Talmage v. Chapel*, 16 Mass. 71; *Barton v. Higgins*, 41 Md. 539; *Young v. O'Neal*, 3 Sneed. 55; *Slauter v. Chenoweth*, 7 Ind. 211; 4 Mason, 16; *Biddle v. Wilkins*, 1 Pet. 686, 7 L. Ed. 315; 70 Cal. 403, 59 Am. Rep. 423. Cf. *Buck v. Johnson*, 67 Ga. 82. Also to enable his indorsee, assignee or transferee to sue on a negotiable instrument or other written evidence of debt in another State, although he might not have sued directly upon it as a representative of the deceased. *Peterson v. Chemical Bank*, 32 N. Y. 21, 88 Am. Dec. 298; *Leake v. Gilchrist*, 2 Dev. L. 73; *Wilkins v. Ellett*, 108 U. S. 256, 258, 27 L. Ed. 718; *Smith v. Tiffany*, 16 Hun, 562. Cf. 20 S. C. 167; 58 S. W. 637; 8 Greenl. 353; *Robinson v. Crandall*, 9 Wend. 425. But cf. 66 P. 971, 135 Cal. 14; 5 Greenl. 261, 17 Am. Dec. 228; 2 N. H. 291. As to selling and assigning stock of a foreign corporation, see *Luce v. Manchester R.*, 63 N. H. 588, 3 A. 618. See further, 35 S. E. 503, 57 S. C. 235; *Stoddard v. Aiken*, 35 S. E. 501, 57 S. C. 134; *Taylor v. Syme*, 57 N. E. 83, 162 N. Y. 513. Upon a contract made with himself, as executor or administrator, a foreign executor or administrator may sue or be sued. 3 Barb. Ch. 71; *Barrett v. Barrett*, 8 Greenl. 346; *Du Val v. Marshall*, 30 Ark. 230; *Trotter v. White*, 10 Sm. & M. 607; *Wilkins v. Ellett*, 108 U. S. 256, 27 L. Ed. 718; *Johnson v. Wallis*, 112 N. Y. 230, 8 Am. St. Rep. 742, 19 N. E. 653, distinguishing such liabilities as were purely based upon transactions of the decedent.

<sup>3</sup> *Wright v. Phillips*, 56 Ala. 69; 105 Fed. 28.

which case, the fund is applicable to debts, legacies, and expenses at the principal jurisdiction, as well as to distribution.<sup>1</sup> The rule to thus pay over is not, however, absolute; on the contrary, the transfer will not be made if deemed, under the circumstances, improper, and legislative policy is to secure the rights of its creditors and citizens at all hazards.<sup>2</sup>

**175. To hold a domestic executor or administrator answerable for foreign property which he can neither collect nor sue upon, nor**

<sup>1</sup> Such transmission is natural and proper where it appears that no debts are owing in the ancillary jurisdiction. *Wright v. Gilbert*, 51 Md. 146. And see *Twimble v. Dziedzyiki*, 57 How. (N. Y.) Pr. 208; *Wms. Exrs. 1664*; *Story Conf. Laws*, § 513; *Low v. Bartlett*, 8 Allen, 259; 18 How. (U. S.) 100, 15 L. Ed. 299; *Hayes v. Pratt*, 147 U. S. 557, 37 L. Ed. 279; 50 L. J. Ch. 740.

<sup>2</sup> 5 Md. 467; *Lawrence v. Kitteredge*, 21 Conn. 577, 56 Am. Dec. 385; *Gilchrist v. Cannon*, 1 Coldw. 581; 6 Vt. 374; *Fretwell v. Lemore*, 52 Ala. 124; 1 Mason, 381; *Hughes, Re*, 95 N. Y. 55. As between different States, assets will be more readily transmitted in avoidance of claimants of the residue, *semble*, than where the domiciliary jurisdiction was a foreign one. *Aspden v. Nixon*, 4 How. 467. And if doubts arise as to the genuineness of foreign claims to the residue, as against domestic distributees or the State itself, this might furnish reason for holding back the fund for inquiry. Domestic distributees may have an interest in the question of transmitting assets. 151 Mass. 604, 25 N. E. 26.

To the domiciliary representative, and not to an ancillary one, claimants who are not creditors of the estate, and especially legatees, residuaries and distributees, should report for the allowance of their respective rights. 1 Barb. Ch. 189; 8 Mass. 506; *Campbell v. Sheldon*, 13 Pick. 23; *Russell v. Hooker*, 67 Conn. 24, 34 A. 711. Distribution of the estate, and the rights of legatees and of the surviving husband or widow, affecting the surplus, should be regulated by the law of the domicile of the testator or intestate, at the time of his decease. 3 Bradf. (N. Y.) 233; 3 Sandf. Ch. 512; *Goodall v. Marshall*, 11 N. H. 88, 35 Am. Dec. 472; *Jones v. Gerock*, 6 Jones (N. C.) Eq. 190; *Tucker v. Candy*, 10 Rich. Eq. 12. But as to the payment of local debts out of the local assets, or of local funeral or burial expenses, properly chargeable against the estate, the law of the place under which an ancillary administration is taken, must govern. *Ib.* And see *Wms. Exrs. 1664*; 165 Mass. 240, 43 N. E. 98. And the satisfaction of local creditors, in full or *pro rata*, according as the general solvency or insolvency of the estate may require, or the local statute prescribe, is incumbent upon the ancillary administrator, before he remits the balance to the foreign executor or administrator. *Davis v. Estey*, 8 Pick. 475; *Mitchell v. Cox*, 22 Ga. 32, 68 Am. Dec. 481; *Normand v. Grogard*, 14 N. J. L. 425. For the spirit of comity does not require that citizens shall be put to the inconvenience and expense of proving and collecting their claims abroad when there are assets at hand, or that local rules for distributing an insolvent's estate shall yield to foreign; nor, on the other hand, can it approve of the absorption of local assets by local creditors, to the prejudice of creditors at the domicile; but what it asks is, that the local estate shall, as far as practicable, be so disposed of that all creditors of the deceased, in whatever jurisdiction, shall receive their proportional share, if the estate be insufficient to pay them in full. *Newell v. Peaslee*, 151 Mass. 604, 25 N. E. 26 (assets retained for a claim not yet fully accrued). And see *Welles's Estate*, 161 Penn. St. 218, 28 A. 1117.

The accountability of an administrator for assets received locally, and all questions as to the faithful or unfaithful discharge of his duties and his liability therefor are rightfully decided by the laws, solely, of the State or country where he is appointed. *Partington v. Attorney-General*, L. R. 8 H. L. 100, 119; *Fay v. Haven*, 3 Met. 109; *Hooper v. Olmstead*, 6 Pick. 481; *Heydock's Appeal*, 7 N. H. 496; 5 Barb. 73; *McGehee v. Polk*, 24 Ga. 406; 8 Ala. 391; *Marrion v. Titsworth*, 18 B. Mon. 582; *Grant v. Reese*, 94 N. C. 720; 50 Mich. 22, 14 N. W. 684; *Crawford, Re*, 67 N. E. 156, 68 Ohio St. 58, 96 Am. St. Rep. 648; *Ramsey v. Ramsey*, 63 N. E. 618, 196 Ill. 179.

compel its payment or delivery to himself by virtue of his domestic appointment,—foreign property, too, of whose existence, or of the grant of foreign administration for realizing it as assets, he may be quite unaware,—would be unjust.<sup>1</sup> And yet, to let external assets knowingly escape his control, and be lost to the estate, when with reasonable diligence they might have been procured, seems a plain dereliction of duty in the principal or domiciliary representative; whose function, as rightly understood, is to grasp the whole fortune, as the decedent did during his life, save so far as the obstructive law of foreign *situs* or the limitations of his own appointment may restrain him.<sup>2</sup>

176. **No conflicting grant of authority appearing, the domiciliary appointee of another State may take charge of and control personal property of the deceased in the State of its *situs*, as various decisions rule; and for such assets he should account in the domiciliary jurisdiction.<sup>3</sup>** The Supreme Court of the United States has maintained the validity of such payments or delivery of the assets, as between different States, so as to discharge the local debtor or possessor; and the general current of American authority supports this doc-

<sup>1</sup> See Story Conf. Laws, § 514 *a*, commenting upon earlier English decisions; *Wms. Exrs.* 1661, 1662; 4 M. & W. 171; 6 Co. 17 *b*.

<sup>2</sup> If, therefore, assets cannot be collected and realized for the benefit of the estate, without a foreign ancillary appointment, the executor or administrator of the decedent's last domicile ought (so far as may be consistent with his information, the means of the estate at his disposal and the exercise of a sound discretion,) to see that foreign letters are taken out and that those assets are collected and realized, and the surplus transmitted to him. For property of a chattel nature, situated or payable elsewhere, which is capable, nevertheless, of being transferred and realized by acts done in the domestic jurisdiction, he should be held accountable. 173 *supra*; 4 M. & W. 171, 192; *Trecothick v. Austin*, 4 Mason, 33; *Hutchins v. State Bank*, 12 Met. 421; *Butler, Estate of*, 38 N. Y. 397. And so, too, if he may enforce the demand against the debtor, without resort to the foreign jurisdiction. *Merrill v. N. E. Mut. Life Ins. Co.*, 103 Mass. 245. If, however, foreign letters and an ancillary appointment at the *situs* be needful or prudent, in order to make title and to collect and realize such assets, the principal representative should perform the ancillary trust or have another perform it, observing due diligence and fidelity, according as the laws of the foreign jurisdiction may permit of such a course; and if, in accordance with those foreign laws, a surplus be transmitted to the principal and domiciliary representative, or otherwise transferred, so as to be held by him in such capacity for payment and distribution, he will become liable for it, accordingly. *Attorney-General v. Dimond*, 1 Cr. & Jerv. 370; 11 Cr. & Jerv. 157; *Wms. Exrs.* 1661; 10 Pick. 78; *Clark v. Blackington*, 110 Mass. 372; *Stokely's Estate*, 19 Penn. St. 476.

As to including such assets in his inventory, this depends upon circumstances; and it is getting the foreign assets into his active control that mainly charges him here. See 11 Wend. 363; *Butler, Estate of*, 38 N. Y. 397; *Wms. Exrs.* 1664; 116 N. W. 986, 153 Mich. 206, 18 L. R. A. (N. S.) 149; *Young v. Kennedy*, 95 N. C. 265.

<sup>3</sup> *Van Bokkelen v. Cook*, 5 Sawyer, C. C. 587; 10 Paige, 549, 42 Am. Dec. 94; *Parsons v. Lyman*, 20 N. Y. 103; *Barnes v. Brashear*, 2 B. Mon. 380; *Denny v. Faulkner*, 22 Kan. 89. Cf. *Harrison v. Mahorner*, 14 Ala. 843; *supra*, 173, 174.

trine; there being, it is assumed, when such payment or delivery was made, no local administration.<sup>1</sup>

177. **How far executors or administrators are liable in a domestic jurisdiction for acts done abroad**, does not appear clearly settled; and different States or countries may be expected to uphold their own legislative policy in preference to external systems.<sup>2</sup>

178. **Upon reciprocal terms, foreign creditors are sometimes permitted to come into the domestic jurisdiction and prosecute their claims against the local assets**; not, however, in such a way as to gain an advantage over domestic creditors; and, in general, they may fairly be required to exhaust the foreign assets before attempting to have domestic assets subjected to their claims.<sup>3</sup>

179. **Principal and ancillary jurisdictions are in privity of relation as concerns different executors of the same testator appointed for different jurisdictions**.<sup>4</sup> But as to administrators, whose appointments are necessarily derived from different sovereign jurisdictions, there is no such privity; and, according to the universal American rule, where uncontrolled by local statute, so independent are different ancillary administrations of the principal administration and of each other, whether in case of testacy or intestacy, that property and assets received in the one forum cannot be sued for

<sup>1</sup> 18 How. 104, 15 L. Ed. 299; 2 Met. 114; *Hutchins v. State Bank*, 12 Met. 425; *Wilkins v. Ellett*, 9 Wall. 741, 19 L. Ed. 587; *Parsons v. Lyman*, 20 N. Y. 103; *Abbott v. Miller*, 10 Mo. 141; *Whart. Conf. Laws*, § 626; *Hatchett v. Berney*, 65 Ala. 39; *Citizens' Bank v. Sharp*, 53 Md. 521; *Wilkins v. Ellett*, 108 U. S. 256, 258, 27 L. Ed. 718; *Purple v. Whithed*, 49 Vt. 187; 51 N. J. L. 78, 16 A. 191; 105 S. W. 952, 32 Ky. Law, 303; 27 So. 735, 52 La. Ann. 1298. But the English rule (applicable in an international sense) appears otherwise. 50 L. J. Ch. 740. And see *Whart. Conf. Laws*, § 172; *Story*, § 515 a; *Young v. O'Neal*, 3 Sneed. 55. And our rule cannot be upheld, to the extent of violating the local law of the jurisdiction where the assets lie or for obstructing local claims; and each State or country has the right to enlarge or limit the privilege and to prescribe the terms upon which it shall be conceded, or to deny it altogether. *Ib.* And see 77 N. Y. S. 256 (debtor should inquire); 72 N. Y. S. 1068, distinguishing 117 N. Y. 125, 22 N. E. 572, 15 Am. St. Rep. 494, 5 L. R. A. 541.

<sup>2</sup> See *Cabanne v. Skinker*, 56 Mo. 357. Equity may charge. *Johnson v. Jackson*, 55 Ga. 326; *Swearingen v. Pendleton*, 4 S. & R. 389; 33 Barb. 92. See this subject discussed. *Story Conf. Laws*, § 514 b; *Wms. Exrs.* 362, 1929. See further, *Pond v. Makepeace*, 2 Met. 114; *Willard v. Hammond*, 21 N. H. 382; *Wms. Exrs.* 362, note by Perkins. And see *Cocks v. Varney*, 42 N. J. Eq. 514, 8 A. 722 (no probate).

<sup>3</sup> *Fellows v. Lewis*, 65 Ala. 343, 39 Am. Rep. 1; *Morton v. Hatch*, 54 Mo. 408. And as to a judgment against one, in his character of executor or administrator, see *Carrigan v. Semple*, 72 Tex. 306, 12 S. W. 178; 28 Tex. 503; *Ela v. Edwards*, 13 Allen, 48, 90 Am. Dec. 174; *Stacy v. Thrasher*, 6 How. 57, 12 L. Ed. 337; *Coates v. Mackey*, 56 Md. 416. The attempt of a domiciliary creditor, who cannot prosecute his claim in the jurisdiction of last domicile, to enforce that claim upon assets, by procuring letters in another jurisdiction, is not to be countenanced. *Wernse v. Hall*, 101 Ill. 423. See further, as to equity intervention, *Carron Iron Co. v. Maclaren*, 5 H. L. Cas. 416; 29 W. R. 169.

<sup>4</sup> *Hill v. Tucker*, 13 How. 458; *ib.* 469.

nor its application compelled in another, nor can a judgment obtained in one such jurisdiction furnish conclusive cause of action in another.<sup>1</sup>

180. **Where the same person takes letters of administration**, both at home and abroad, the rational rule is that, the full and final settlement being made in the jurisdiction of last domicile, the principal representative must be held to account in the domiciliary jurisdiction for the whole of the personal property which has come to his hands, wherever found, or by whatever means collected; so that if he has a surplus in his hands arising out of the administration elsewhere, after paying the expenses of administration and discharging his own liabilities there, he becomes accountable for it in the domiciliary jurisdiction in the same manner as he would be if another had been appointed administrator and had paid over a balance.<sup>2</sup>

181. **The ancillary or local appointee represents only the assets of his particular jurisdiction**, and is not responsible for assets in other jurisdictions; nor in such capacity alone, and independently of some appointment conferred in the jurisdiction of the decedent's last domicile or residence, does it appear that he has any right to follow assets elsewhere. But even an ancillary and local administrator, who receives assets from some jurisdiction to which his authority did not extend, has no right to pervert them to his own use.<sup>3</sup>

182. **Where different executors are named for different jurisdictions under a will**, the case is not one of principal and auxiliary appointments. The executor of last domicile may well demand that other assets be surrendered to him; but there his duty ends, provided he has not the means to compel such surrender.<sup>4</sup>

<sup>1</sup> *Hill v. Tucker*, *supra*; 1 Mason, 415; *Taylor v. Barron*, 35 N. H. 484; *Wms. Exrs.* 363; 97 Ill. App. 270; 30 Ark. 230; *Fay v. Haven*, 3 Met. 109 and cases cited; *Hedenberg v. Hedenberg*, 46 Conn. 30, 33 Am. Rep. 10; *Magraw v. Irwin*, 87 Penn. St. 139; *McCord v. Thompson*, 92 Ind. 565. But as to foreign judgment, see *Barton v. Higgins*, 41 Md. 539; 16 Mass. 71. And see as to local land, *Apperson v. Bolton*, 29 Ark. 418; *Sheldon v. Rice*, 30 Mich. 296, 18 Am. Rep. 136.

But the forum of original administration is the forum in which the final account is to be made; and this forum sometimes reviews fundamental questions involving fraud and error in ancillary administration, affecting the distribution of the estate. *Clark v. Blackington*, 110 Mass. 369; 13 Allen, 48, 90 Am. Dec. 174; *Baldwin's Appeal*, 81 Penn. St. 441. See 173, *supra*.

<sup>2</sup> *Jennison v. Hapgood*, 10 Pick. 77, 100; *Baldwin's Estate*, 81 Penn. St. 441; *Story Conf.*, § 529 b. But the rule of fairness applies as among local claimants. *Cowden v. Jacobson*, 165 Mass. 240, 43 N. E. 98.

<sup>3</sup> *Shegogg v. Perkins*, 34 Ark. 117; *Baldwin's Appeal*, 81 Penn. St. 441; *Wms. Exrs.* 432; *Fay v. Haven*, 3 Met. 109; 7 Cush. 523. Local statutes may be found to modify such rules. See 7 Heisk. 84; 13 S. C. 409.

<sup>4</sup> *Sherman v. Page*, 85 N. Y. 123.

183. **Wherever it appears impracticable for the domestic representative,** appointed in the decedent's last domicile, to procure the control of the foreign assets or surplus of foreign administration, it remains for the legatees or distributees, by such procedure in the foreign jurisdiction as may be suitable, to obtain what belongs to them.<sup>1</sup>

<sup>1</sup> *Sherman v. Paige*, 85 N. Y. 123, 129 (use of the name of domestic representative permitted).

## CHAPTER VIII.

## OFFICIATING WITHOUT AN APPOINTMENT.

184. **English ecclesiastical law styled as executor *de son tort*** (or executor of his own wrong) whoever should officiously intermeddle with the personal property or affairs of a deceased person, having received no appointment thereto.<sup>1</sup>

185. **One who performs acts which only a qualified executor or administrator could have properly performed, may act either as a wrong-doer, utterly without authority, or instead, in perfect good faith, as having a colorable right and perhaps expecting the appointment; the acts performed may be injurious to the estate, and obstructive of those lawfully entitled to its control, on the one hand, or on the other, beneficial and fairly designed for its protection pending the selection and qualification of a legal representative.**<sup>2</sup> According to the different aspects above suggested, our modern law pronounces differently, as it would seem, upon acts performed with reference to the estate of a deceased person by one

<sup>1</sup> Wms. Exrs. 257; Bennett v. Ives, 30 Conn. 329; 4 Harr. 168; Barron v. Burney, 38 Ga. 264; Brown v. Durbin, 5 J. J. Marsh. 170; White v. Mann, 26 Me. 361; Leach v. Pittsburg, 15 N. H. 137; 8 Fost. 473; 3 Edw. (N. Y.) 203; 3 Rich. 413, 45 Am. Dec. 775. Williams observes that the definition of an executor *de son tort* by Swinburne, Godolphin, and Wentworth, is in the same words; viz.: "He who takes upon himself the office of executor," etc. Swinb. pt. 4, § 23, pl. 1; Godolph. pt. 2, c. 8, § 1; Wentw. Off. Ex. c. 14, p. 320. Cf. Dyer 167 a. All this might seem to intimate that the stigma was originally applied with exclusive regard to estates where the deceased person had left a will. But the modern cases above cited make it clear that the significance of executor *de son tort* is not so confined in modern practice, but concerns acts of an executor or administrator. In several American States the title executor *de son tort* is now simply repudiated. 20 Hun (N. Y.) 274; Fox v. Van Norman, 11 Kan. 214; Ansley v. Baker, 14 Tex. 607, 65 Am. Dec. 136; 107 Ala. 355, 18 So. 141; 73 Cal. 459, 14 P. 302, 15 P. 64; 189, 190, *post*. And yet one's exercise of functions which properly pertain to administration without proper credentials, may, by whatever name we call it, be brought to the attention of legal tribunals in any age or country.

<sup>2</sup> The suitable executor named in the last will, or, if there be no will, the surviving husband, widow, or next of kin qualified to administer may, and almost of necessity must, before qualification, perform certain acts when death stops almost the machinery of an individual's affairs; acts which of themselves cannot be regarded perhaps as authorized in advance by any tribunal, and yet are appropriate to the emergency; acts which letters subsequently granted should suffice to protect. Besides this, there are certain duties connected with supervising the funeral and burial, and involving expense to the estate, which may fitly devolve upon one's immediate relatives, rather than upon any executor or administrator at all, and which are usually performed, in fact, before any examination of the papers of the deceased serves to disclose what last will, if any, was left behind, how large was the estate, or who shall rightfully settle the affairs.



who at the time had not been legally appointed and qualified to administer.<sup>1</sup>

186. It is the wrongful or injurious intermeddler, without claim or the color of a title, upon whom sound authorities in law now fasten, in effect, the liabilities of executor *de son tort*, whether that stigma be applied to the intruder or not.<sup>2</sup>

187. The legal consequence of becoming an executor *de son tort* was to render one's self liable, not only to an action by the rightful executor or administrator, but also, so as to be sued as executor by a creditor of the deceased, or by a legatee;<sup>3</sup> for, an executor *de son tort* has all the liabilities, though none of the privileges, that belong to the character of executor.<sup>4</sup>

<sup>1</sup> That administration may sometimes be dispensed with, see *supra*, 120. But not injuriously. 68 N. E. 369, 204 Ill. 184, 96 Am. St. Rep. 185.

<sup>2</sup> See *Smith v. Porter*, 35 Me. 287; *Ward v. Beville*, 10 Ala. 197, 44 Am. Dec. 478; 4 Green (Iowa) 224; 1 Esp. 336. The old books cite, however, many examples *interrorem*, to show that the slightest misappropriation of the goods and chattels of a deceased person may constitute an executorship *de son tort*, unless one was a real executor or administrator. Wms. Exrs. 257, 258; Noy, 69; Godolph. pt. 2, c. 8, § 4; Dyer, 166 b. Even the milking of cows by a widow or another having their custody; which seems absurd if the value of the milk might be accounted for. Cf. *Perkins v. Ladd*, 114 Mass. 420, 19 Am. Rep. 374. Living in the house, and carrying on the trade of the deceased, was held an intermeddling in the same sense. *Wight*, 16. So, too, paying debts or charges on account of the deceased, unless the payment was made with one's own money. *Carter v. Robbins*, 8 Rich. 29. Also demanding, collecting, and giving acquittances for debts due the estate of the deceased. Godolph. pt. 2, c. 8, § 1; Wms. Exrs. 259. So as to the servant or agent of the decedent. *Sharland v. Mildon*, 5 Hare, 468; 1 Dev. L. 331. Or a creditor. *Mitchell v. Kirk*, 3 Sneed. 319. See further, as to holding property of the deceased, *Gleaton v. Lewis*, 24 Ga. 209; 2 T. R. 587; *Alexander v. Kelso*, 57 Tenn. 5; Wms. Exrs. 261; *Allen v. Kimball*, 15 Me. 116; 3 Dev. L. 221, 22 Am. Dec. 717. And see *Tucker v. Williams*, *Dudley* (S. C.) 329, 31 Am. Dec. 561; *Hopkins v. Towns*, 4 B. Mon. 124, 13 Am. Dec. 497; *Simonton v. McLane*, 25 Ala. 353. Cf. 3 Dev. 223. Fraudulent transfers by the testate or intestate are open to attack in the due course of settling the estate. *Bowdoin v. Holland*, 10 Cush. 17; *Norfleet v. Riddick*, 3 Dev. 221, 22 Am. Dec. 717. So as to a surviving widow. 126 Mo. App. 348, 103 S. W. 510; 4 Blackf. (Ind.) 21; *Madison v. Shockley*, 41 Iowa, 451. And see as to a surviving husband, *Phaelon v. Houseal*, 2 McCord Ch. 423. And see *Walton v. Hall*, 66 Vt. 456, 29 A. 803 (cannot offset interest in estate).

But acts performed towards one's property, by virtue of an agency whose revocation by death has not been brought home to the agent, will not constitute an executorship *de son tort*. *Brown v. Benight*, 3 Blackf. 39; *Outlaw v. Farmer*, 71 N. C. 31. Nor can transfers, by way of security or otherwise, which were made by the deceased during his life, and are unimpeachable as in fraud of his creditors. *Morrill v. Morrill*, 13 Me. 415; *O'Reily v. Hendricks*, 2 Sm. & M. 388; *Garner v. Lyles*, 35 Miss. 176. One who takes, by purchase or otherwise, property of the deceased, shall not, unless in collusion with the intermeddler, be chargeable as executor *de son tort*, but the intermeddler shall be charged alone. *Paul v. Simpson*, 9 Q. B. 365; Wms. Exrs. 263; *Smith v. Porter*, 35 Me. 287. And see *Rockwell v. Young*, 60 Md. 563. In modern times too, the innocent custodian or bailee is sheltered by the law, especially if he has a lien right. 1 Esp. 336; Wms. Exrs. 263; *Graves v. Page*, 17 Mo. 91.

One, moreover, who takes and may claim as his or her own, property held by the decedent as bailee, does not hold such property as executor *de son tort*. *Morris v. Lowe*, 97 Tenn. 243, 36 S. W. 1098.

<sup>3</sup> Wms. Exrs. 265; Bac. Abr. Executors, B, 3.

<sup>4</sup> *Carmichael v. Carmichael*, 1 Phill. Ch. 103 (*per* Lord Cottenham). This latter liability is quite abnormal. See also *Grace v. Seibert*, 85 N. E. 308, 235 Ill. 790. Why

188. **Aside from all fictions of an executorship *de son tort*, the rational consequence follows, that the acts shall be judicially treated with reference to their injurious or beneficial character to the estate, as also to the situation and motives of the person whose conduct toward it is considered.**<sup>1</sup>

a person who thus acts should be suable by third parties as an executor, is, so the older text-writers affirm, because strangers may naturally conclude from such conduct that he has a will of the deceased which he has not yet proved. 2 Bl. Com. 507, 508; Wms. Exrs. 265. Yet such a supposition must, in many cases, be purely imaginary; the party who sued knowing perfectly well, all the time, that the intermeddler was wrongful, or done for some other and inconsistent purpose. Upon such a fiction, however, the pleadings are conducted. If the person sued as executor *de son tort* should plead *ne unques executor*, and the creditor suing him joins issue, the judgment on proof of acts such as constitute in law an executorship *de son tort* would be that the plaintiff recover the debt and costs, to be levied out of the assets of the testator, if the defendant have so much; but if not, then out of the defendant's own goods. Wms. Exrs. 266; Cro. Jac. 648. But cf. *Robinson v. Bell*, 2 Vern. 147, which intimates that in cases of gross disproportion of this levy to the property meddled with, equity will relieve the executor *de son tort*. And all this heavy responsibility incurred in law to creditors of the estate, because of giving away a dog or bedstead of the deceased debtor; a penalty out of all proportion to the character of the offence, and with so little exercise of real discrimination, that the gross intermeddler might fare better than a custodian who had thoughtlessly, and not wilfully, disposed of what was likely to spoil before a lawful representative could intervene. See *Campbell v. Booth*, 7 Cow. 64; *Hubble v. Fogartie*, 1 Hill (S. C.) 167, 26 Am. Dec. 163; *Busb. L. 399*; *Bailey v. Miller*, 5 Ire. 444; *Riddle v. Hill*, 51 Ala. 224; *Ellis v. McGee*, 63 Miss. 168. While, however, by sincerely denying that he was an executor, the incautious intermeddler might thus fall upon the thorns, it was open to him to escape the worst by taking the humor of the fiction, and alleging on his own part *plene administravit*; under which plea he was only chargeable for the assets which had actually come to his hands, and might relieve himself by showing payments made to other creditors of equal or superior degree, so as to have exhausted such assets, or a delivery of assets to the rightful executor or administrator before action brought. Wms. Exrs. 267; 1 Salk. 313. But payment made, *after* action brought, to the rightful administrator is not a good plea to the creditor's action. *Curtis v. Vernon*, 3 T. R. 587; 2 H. Bl. 18; *Morrison v. Smith*, *Busb. L. 399*. Yet even thus he may apply the assets in his hands to the payment of a superior debt, and plead accordingly. *Oxenham v. Clapp*, 2 B. & Ad. 309. And by pleading both *ne unques executor* and *plene administravit*, absurdly inconsistent as such pleas must have been, the intermeddler had a double means of escaping the perilous consequences of the creditor's suit. *Hooper v. Summersett*, Wight, 20. An executor *de son tort* cannot set up in defence to the creditor's suit that he retained the property for his own debt; not even the rightful executor's or administrator's assent will give such an impolitic plea validity. See Wms. Exrs. 269; Cro. Eliz. 630; *Yelv. 137*; *Bull. N. P. 143*; *Curtis v. Vernon*, 2 T. R. 587. Cf. 2 Ventr. 180.

<sup>1</sup> The common law pleadings, if carefully pursued, were not unfavorable to such a discrimination; and such a discrimination does a man of sense, unread in the law, draw when left, as any one may be, with assets of a dead person in his custody, which no one else for the moment has any legal right to demand of him. And, accordingly, do we find the legislative policy of modern times tending to reject this antiquated theory of executorship *de son tort*, and defining one's liability, under circumstances like these, by rules more consonant to reason and justice. For, otherwise, it might be said that the common law preferred that the personalty of a deceased person should go to waste rather than let any one without regular authority take the responsibility of protecting it at a critical moment, even though that possession and responsibility had been thrust upon him without his agency. The acts, moreover, of one having the color of a title or a claim to administration, and like a widow, next of kin, legatee, or creditor, directly interested in preserving the estate, are, if so performed that the

189. **Modern legislation is found, therefore, to reduce very considerably this common-law liability** of the executor *de son tort*: employing, perhaps, the old official title; but making such a person liable to the actions of creditors and others aggrieved, if liable to them at all, only for the property taken and to the extent of the actual damage caused by his acts;<sup>1</sup> or, perhaps, in some definite penal sum based upon the amount of the estate taken by him.<sup>2</sup>

190. **Modern inclination, and that particularly of American States, tends, moreover, to the natural and reasonable doctrine of holding the intruder or officious intermeddler liable, according to the wrongful character of his acts, to the rightful executor or administrator upon the estate, and to him alone.**<sup>3</sup> A purchase from an executor *de son tort* confers no better title than that of the vendor;<sup>4</sup> subject to the usual exceptions in favor of the *bona fide* purchasers of negotiable instruments not overdue, for valuable consideration.<sup>5</sup>

rightful allowance, share, legacy, or debt of the custodian may stand as indemnity for the transaction, treated with increasing indulgence, in contrast with those performed by some stranger who officiously intrudes.

<sup>1</sup> *McKenzie v. Pendleton*, 1 Bush, 164; 4 Mass. 654; *Cook v. Sanders*, 15 Rich. 63, 94 Am. Dec. 139; *Elder v. Littler*, 15 Iowa, 65; *Hill v. Henderson*, 13 Sm. & M. 688; *Stockton v. Wilson*, 3 Penn. St. 130; *Collier v. Jones*, 86 Ind. 342.

<sup>2</sup> Double the amount of the estate intermeddled with is fixed by a New Hampshire statute. *Bellows v. Goodal*, 32 N. H. 97; 26 N. H. 493. See also, *Spaulding v. Cook*, 48 Vt. 145; 14 Or. 256, 12 P. 370; 90 N. C. 553; 72 N. J. Eq. 740, 66 A. 1090; *Allen v. Hurst*, 48 S. E. 341, 120 Ga. 763. Creditors cannot be considered aggrieved, under such statutes, without regard to the legal priorities observed among them, in settling an estate; nor can legatees, apart from the usual rule that the claims of creditors take precedence. *McConnell v. McConnell*, 94 Ill. 295; *Rozelle v. Harmon*, 103 Mo. 339, 15 S. W. 432, 12 L. R. A. 187; *Taylor v. Moore*, 47 Conn. 278. And see *Goff v. Cook*, 73 Ind. 351; 58 Ind. 169; 103 Mo. 343, 344, 15 S. W. 432, 12 L. R. A. 187.

<sup>3</sup> Mass. Gen. Stats. c. 94, § 15. And see *Hill v. Henderson*, 13 Sm. & M. 688; *Barasien v. Odum*, 17 Ark. 122; *Root v. Geiger*, 97 Mass. 178. And see 184, n.

<sup>4</sup> *Carpenter v. Going*, 20 Ala. 587; *Rockwell v. Young*, 60 Md. 563.

<sup>5</sup> *Woolfork v. Sullivan*, 23 Ala. 548, 58 Am. Dec. 305.

As a general rule, any one who assumes to dispose of personal property belonging to the estate of a deceased person may be held responsible to the rightful personal representative, in tort, as for a conversion of the property, whether such representative receive his appointment before or after the conversion. *Manwell v. Briggs*, 17 Vt. 176; *Wms. Exrs.* 270; *Shaw v. Hallihan*, 46 Vt. 389, 14 Am. Rep. 628. If thus sued, one may show, in mitigation of damages, payments made by him such as the lawful executor or administrator would have been bound to make, though nothing beyond. *Tobey v. Miller*, 54 Me. 480; *Reagan v. Long*, 21 Ind. 264; 4 Watts, 432; *Dorsett v. Frith*, 25 Ga. 537; 9 Mass. 74; *McMeekin v. Hynes*, 80 Ky. 343; 68 Fed. 605; *Gay v. Lemle*, 32 Miss. 309. Whether, when sued in trover, one can show payment of debts to the value of goods not sold but still in his custody, see *Wms. Exrs.* 270, & n.; *Mountford v. Gibson*, 4 East, 447; 5 B. & Ald. 744; *Hardy v. Thomas*, 23 Miss. 544, 67 Am. Dec. 152. Upon the subject of recouping damages, local statutes and rules of practice must be considered, and general works on that subject. The right to recoup debts paid is affected by the solvency or insolvency of the estate. *Mountford v. Gibson*, 4 East, 453; *Wms. Exrs.* 271; *Neal v. Baker*, 2 N. H. 477. As to applying assets for the distributees, etc., see *Brown v. Walker*, 58 Ala. 310. But while the act of the intruder is itself tortious, as in selling, for instance, it may, never-

191. No intermeddling with the lands of the deceased will charge a person as technical executor *de son tort*; for such interference, on general principles, is a wrong done to the heir or devisee.<sup>1</sup>

192. Where one takes out letters under a void or voidable grant, as executor or administrator, it is said, sometimes, that he becomes executor or administrator *de son tort*.<sup>2</sup>

193. Upon the ancient theory, various acts, beneficial in their character, might be performed without exposing one to the perilous risk of an executor *de son tort*; though the discrimination made was a very cautious one.<sup>3</sup> Legal and proper acts done by an executor *de son tort*, moreover, are held good against the true representative of the estate, if the latter would have been bound to do likewise in the due course of administration.<sup>4</sup>

theless, be advantageous to the executor or administrator to waive the tort, and bring assumpsit for the proceeds; which he may accordingly do; and even for the tort the damages recoverable may be merely nominal. *Upchurch v. Nosworthy*, 15 Ala. 705; 52 Penn. St. 370. See further, *Nease v. Capehart*, 8 W. Va. 95. See further, *Ross v. Newman*, 26 Tex. 131, 80 Am. Dec. 646; *Sellers v. Licht*, 21 Penn. St. 98; *Rockwell v. Young*, 60 Md. 563.

<sup>1</sup> *Mitchel v. Lunt*, 4 Mass. 654; 1 Root, 104; *Nass v. Van Swearingen*, 7 S. & R. 196; *Ela v. Ela*, 47 A. 414, 70 N. H. 163. The lands of the deceased are in no sense assets in the hands of an executor *de son tort*. 4 Mass. 654; 80 Ga. 260, 5 S. E. 629. Cf. Part VI, *post*.

<sup>2</sup> *Bradley v. Commonwealth*, 31 Penn. St. 522. And see *Damouth v. Klock*, 29 Mich. 290; 49 Ala. 137, 586. That he shall be held answerable for his official acts committed *de facto* we cannot doubt; but it does not appear that his *status* is that of the common-law executor *de son tort*, necessarily under circumstances which impute to him no intentional wrong. See *supra*, c. 6; *Plowd.* 82; *Wms. Exrs.* 272. As to a void administration fraudulently procured see 25 Hun (N. Y.) 355.

<sup>3</sup> One might order or furnish a funeral suitable. The ordering of the funeral and even of the immediate place of burial belongs naturally to the surviving spouse or immediate family. 167 Mass. 307, 45 N. E. 748. And see 421, 422. Or supply the young children of the deceased with necessities; or feed his cattle, or make out an inventory, or lock up the effects; and, in general, take good care of the property, according to the circumstances and its situation. *Brown v. Sullivan*, 22 Ind. 359, 85 Am. Dec. 421; 12 Conn. 212; *Graves v. Page*, 17 Mo. 91; *Wms. Exrs.* 262; *Godolph. pt. 2, c. 8*; *Harrison v. Rowley*, 4 Ves. 216; 119 N. C. 510. And see *Camden v. Fletcher*, 4 M. & W. 378; *Taylor v. Moore*, 47 Conn. 278. All these were beneficial acts and offices of decency and prudence, commendable though performed from motives not exalted. *Swinb. pt. 2, § 23*; *Wms. Exrs.* 262; 5 Co. 30 b.

<sup>4</sup> The fair sale of goods, or payment of money out of the assets for debts has sometimes been upheld. 1 Ld. Raym. 661; *Plowd.* 282. Cf. 190; 4 East, 441. Prudence is exacted of bailees. See *Root v. Geiger*, 97 Mass. 178; *Graves v. Page*, 17 Mo. 91; *Schoul. Bailments, passim*.

The circumstance that a widow is left in possession of some goods of her deceased husband does not, as modern practice inclines, justify a ready inference of executorship *de son tort* on her part, with its penal obligations; especially if young children must be maintained by her. 6 Blackf. 367; *McCoy v. Paine*, 68 Ind. 327; *Crashin v. Baker*, 8 Mo. 437; *Peters v. Leader*, 47 L. J. Q. B. 57. Cf. 66 Vt. 455, 29 A. 803.

Technical construction is not favored latterly. *Alfriend v. Daniel*, 48 Ga. 154; *Winn v. Slaughter*, 5 Heisk. 191. But cf. as to a just liability, *Damouth v. Klock*, 29 Mich. 290. Nor should the act of any other person or public official, vested with proper custody of a dead person's estate, pending the appointment and qualification of a legal representa-

194. **Acts done by the rightful representative** before he has been duly appointed and qualified may be considered. The old law inclined to treat executors and administrators differently in this respect. Upon an executor, the various preliminary acts which pertain to preserving the personal estate, and (as might happen, besides) ordering the funeral and meeting other emergencies of the situation, were thought to devolve most fitly.<sup>1</sup> All acts of this character performed by an executor were confirmed by his subsequent probate credentials.<sup>2</sup> More than this, an executor, by sole virtue of the authority which his testator had conferred upon him, might proceed at once to do almost all the acts incident to his office, except to sue.<sup>3</sup> It is generally admitted in this country, as in England, that one's appointment as executor relates back so as to absolve him from all personal liability for acts committed before his appointment without a strict probate sanction; though this, by fair inference, affords immunity only as to acts which come properly within the authority and scope of a rightful representative.<sup>4</sup>

tive, import such executorship. *Taylor v. Moore*, 47 Conn. 278. And see 97 Tenn. 243, 36 S. W. 1098; 163 Mass. 202. In general, the representative may ratify beneficial dealings with the estate, and thus assume the responsibility. *Seaver v. Weston*, 163 Mass. 202, 39 N. E. 1013. Cf. *Watson, Re*, 19 Q. B. D. 234; 53 S. W. 763.

<sup>1</sup> Courts of common law and equity looked chiefly to the title one derived from the testator's own selection; regarding probate and qualification in the ecclesiastical court as of secondary importance.

<sup>2</sup> 9 Co. 38 a; Plowd. 281; Wms. Exrs. 293, 629; *Woolley v. Clark*, 5 B. & Ald. 745; 2 W. Bl. 692; *Whitehead v. Taylor*, 10 Ad. & E. 210.

<sup>3</sup> Where an executor had actual possession of the personal property in question, he might, on general principle, sue as in trespass, trover, or replevin. Plowd. 281; *Oughton v. Seppings*, 1 B. & Ad. 241; Wms. Exrs. 306, 307. But where the executor's suit is on behalf of the estate, and in a representative capacity, the letters must be produced. 1 Salk. 285; 3 Taunt. 113; *Webb v. Adkins*, 14 C. B. 401; *Tarn v. Commercial Bank*, 12 Q. B. D. 294. He might take any of the testator's personalty, entering peaceably for that purpose into the house of heir or stranger; he might distrain for rent due the testator, and enter upon his terms for years; he might settle or assent to the claims of creditors and legatees upon the estate; he might, at discretion, sell, give away, assign, or otherwise transfer and dispose of the testator's goods and chattels; and all this before probate. Godolph. pt. 2, c. 20; *Rex v. Stone*, 6 T. R. 298; *Whitehead v. Taylor*, 10 Ad. & E. 210; Wms. Exrs. 302, 303. Although the executor might die before probate after doing any of those acts, the act itself stood firm and good. But probate might still be needful for founding a title or enforcing. 1 Salk. 309; *Johnson v. Warwick*, 17 C. B. 516; Wms. Exrs. 303, 304; 1 Dr. & Sm. 583.

<sup>4</sup> 21 Barb. 311; 105 N. Y. S. 872; 6 Fost. 493; *Stockton v. Wilson*, 3 Penn. St. 130; *Shirley v. Healds*, 34 N. H. 407; 9 Mass. 337, 6 Am. Dec. 72; 1 McCord, 132; *Wiggin v. Swett*, 6 Met. 197; 55 N. J. Eq. 456, 37 A. 455. But American legislation departs so far from the older theory, that no appointment as executor may be safely deduced from the will itself, even though the rightful probate of that will were unquestioned; for the will should be presented speedily for probate, nor should an executor designated therein act as one having genuine authority, until he has been duly appointed by the court and has qualified by giving bonds. Hence, acts not of themselves justifiable in the prudent interest of the estate, pending one's full appoint-

195. An administrator may, by relation, ratify and make valid all acts which come within the scope of a rightful administrator's authority; and whatever dealings, justifiable on this principle, and in the interest of the estate, he may have had with it before his appointment, are cured, in modern practice, by the grant of subsequent letters.<sup>1</sup>

ment, are not likely to bind the estate so readily, but rather would involve him and his own estate. *Selleck v. Rusco*, 46 Conn. 370; *Dixon v. Ramsay*, 3 Cranch. 319. He is before probate a sort of trustee for all concerned, if virtually accepting. *Clapp v. Stoughton*, 10 Pick. 463; *Shirley v. Healds*, 34 N. H. 407; *Wiggin v. Swett*, 6 Met. 197, 39 Am. Dec. 716; *Brown v. Gibson*, 1 Nott. & M. 326. And see *Shoenberger v. Savings Institution*, 28 Penn. St. 459.

<sup>1</sup> *Alvord v. Marsh*, 12 Allen, 603; *Outlaw v. Farmer*, 71 N. C. 35; 21 Barb. 311; *Emery v. Berry*, 8 Post. 473; 15 Mass. 322; *Globe Insurance Co. v. Gerisch*, 163 Ill. 625, 54 Am. St. Rep. 486, 45 N. E. 563. The modern tendency is to look indulgently upon previous acts and dealings, not positively arbitrary and wrongful on his part, for which he can show a subsequent appointment; and thus is lessened the force of earlier distinctions which availed more strongly in an executor's favor. Such beneficial acts as have been seen not to constitute one an executor *de son tort* are certainly protected by a subsequent appointment as administrator; and even acts less justifiable in theory, such as selling or pledging sundry chattels of the deceased, have been sustained on the ground that the act was beneficial to the estate, or at least such as others had no reason to complain of; while, of course, for acts injurious to the estate, previous to his appointment, one must respond. *Moore*, 126; 1 Salk. 295; *Wms. Exrs.* 407, 408; *Mountford v. Gibson*, 4 East, 446; *Magner v. Ryan*, 19 Mo. 196; *Rattoon v. Overacker*, 8 Johns. 126; 2 Hill (N. Y.) 225, 38 Am. Dec. 584; *Taylor v. Moore*, 47 Conn. 278; *Tucker v. Whaley*, 11 R. I. 543; *Luscomb v. Ballard*, 5 Gray, 403, 66 Am. Dec. 374. Cf. *Jones v. Jones*, 118 N. C. 440, 24 S. E. 774 (cancelling a just debt). See further, *Olmstead v. Clark*, 30 Conn. 108; *Walker v. May*, 2 Hill Ch. 22; *Hazelden v. Whitesides*, 2 Strobb. 353. As to confirming a sale after appointment, see *Hatch v. Proctor*, 102 Mass. 351. The greater leniency appears due where the appointee had previously the responsibility of custodian of the dead person's effects, and acted virtually in that capacity.

According to the old law, it is true, executors and administrators were differently treated. For an administrator's title, being founded in letters and on a formal appointment by the court, such officer had no right of action, it was said, until he had actually received his credentials. *Woolley v. Clark*, 5 B. & Ald. 745; *Wms. Exrs.* 630; 8 B. & C. 285. This distinction, however, has become of little consequence at the present day, —and especially in the United States,—for both executors and administrators are required to qualify alike. Appointment and qualification, whether of executor or administrator, cause one's letters of authority, when granted, to relate back for most practical purposes, therefore, to the time of the death of the testate or intestate whose estate is to be settled, the title meanwhile being in a sort of abeyance. 23 Pick. 128; *Alvord v. Marsh*, 12 Allen, 603; *Hatch v. Proctor*, 102 Mass. 351 (acts technically tortious protected); *Babcock v. Booth*, 2 Hill, 181, 38 Am. Dec. 578; *Wells v. Miller*, 45 Ill. 382; *Goodwin v. Milton*, 25 N. H. 458. See also as to chancery suits, *Bateman v. Margerison*, 6 Hare, 496; 7 B. & C. 406; *Wms. Exrs.* 405; 57 How. (N. Y.) Pr. 331. Modern statutes, to some extent, regulate expressly the devolution of title to personal property where one dies intestate, and tend to put executors and administrators, before the issuance of letters, upon a corresponding footing of authority. See stat. 22 & 23 Vict. c. 95, § 19, personal estate and effects of any person; *Wms. Exrs.* 635; *Humbert v. Wurster*, 22 Hun (N. Y.) 405. See further, *Clark v. Pishon*, 31 Me. 503; *per curiam* in *Hatch v. Proctor*, 102 Mass. 351, 354; *Alvord v. Marsh*, 12 Allen, 603. The doctrine of relation, however, appears not here applicable so as to constitute an estoppel as to title against the sound interests of the estate. *Cooley, J.*, in *Gilkey v. Hamilton*, 22 Mich. 283, 286, 287. And see *Morgan v. Thomas*, 8 Ex. 308; *Crump v. Williams*, 56 Ga. 590.

196. In English practice, agreeably to the theory that an executor's title is mainly derived from his testator, the person designated as executor under a will, who performs an act of administration, cannot afterward refuse to probate the will and accept the office.<sup>1</sup> This course seems incompatible with the American doctrine, which refers the appointment rather to one's qualification and satisfying the court that he is suitable in fact for the office; from which aspect, indeed, one who had acted imprudently and injuriously to the estate, before receiving letters, might be deemed most unsuitable.<sup>2</sup>

197. Whoever shall injuriously intermeddle with the estate after letters are granted renders himself liable to suit as a trespasser.<sup>3</sup> Such intermeddler is not by technical construction an executor *de son tort*; but if his interference be actually under claim of an office, he might be thus charged.<sup>4</sup>

197a. The *bona fide* payment to the sole distributee of an ample estate by a debtor of the decedent, before administration is granted, should operate to discharge him from liability to the administrator.<sup>5</sup>

<sup>1</sup> Perry's Goods, 2 Curt. 855; Wms. Exrs. 276.

<sup>2</sup> Neither in English nor American practice will a widow, next of kin, or other person lawfully entitled to take out letters of administration, be compelled to do so because of having previously intermeddled; but some one else may receive the appointment. *Ackerley v. Oldham*, 1 Phillim. 248; Wms. Exrs. 438. See further, *Carnochan v. Abrahams*, T. P. Charl. (Ga.) 196; *Bingham v. Crenshaw*, 34 Ala. 683.

<sup>3</sup> Salk. 313; Wms. Exrs. 261.

<sup>4</sup> Wms. Exrs. 261, and note commenting on *Peake*, N. P. C. 87, and 1 Turn. & R. 438.

<sup>5</sup> *Vail v. Anderson*, 61 Minn. 552, 555, 84 N. W. 47, and cases cited. So, too, should the sole distributee be protected in possession of what he may *bona fide* have collected, as against a representative later appointed, where there are no debts. *Ib.* For the courts should protect an equitable right where it exists.

## PART III.

## ASSETS AND THE INVENTORY.

## CHAPTER I.

## ASSETS OF AN ESTATE.

198. The word "assets" our English and American law usually applies to such property belonging to the estate of a deceased person as may rightfully be charged with the obligations which his executor or administrator is bound to discharge.<sup>1</sup>

199. In pursuing his first and important duty of gathering under his own control, for the purposes of administration, the property which the deceased may have left behind, an executor or administrator seeks rightfully, therefore, simply the personal property.<sup>2</sup>

200. Incorporeal property or money rights, as well as corporeal personal property, are assets.<sup>3</sup>

<sup>1</sup> See Wms. Exrs. 1655 (*i.e.*, property "sufficient," etc.). In modern practice, and conformably to our modern legislation, all the property of a deceased person, real, personal, or mixed, is liable for his debts and the usual charges incidental to death and the settlement of his estate. But a fundamental distinction has always been recognized between the real and personal estate, in the application of this rule; for the personal estate left by the deceased constitutes the primary fund for all purposes of administration; his real estate as a secondary fund not being available for assets until the personalty has been exhausted, leaving obligations still undischarged; nor available at all without special proceedings. Personalty vests immediately in the executor or administrator for the purposes of his trust; but real estate (subject to such special exceptions as a will may have created) in the heir or devisee; only to be divested afterwards under circumstances of necessity.

<sup>2</sup> 19 Barb. 473; Wells v. Miller, 45 Ill. 382; Wms. Exrs. 1656; Snodgrass v. Cabiness, 15 Ala. 160. What is personal property, as contrasted with real, is discussed at length in 1 Schoul. Pers. Prop. §§ 25-160; Wms. Exrs. 650-770. The property must, of course, be that of the decedent. 70 Vt. 458, 41 A. 508.

<sup>3</sup> Bonds, notes, deposits, claims, etc., are included. Wms. Exrs. 703, 1656; 2 Conn. 533; Bullock v. Rogers, 16 Vt. 294; 1 Bradf. (N. Y.) 241. Also legacies and distributive shares. Storer v. Blake, 31 Me. 289; Pease v. Walker, 20 Wis. 573; 144 N. Y. 557, 39 N. E. 691. Cash, household goods, cattle, ornaments, vessels, are corporeal personal property. See Lambright v. Lambright, 78 N. E. 265, 74 Ohio St. 198.

Savings, profits and accumulations out of the general personal estate become assets as well as the original estate itself. Wingate v. Pool, 25 Ill. 118. Also income and interest. 8 S. & R. 299; Ray v. Doughty, 4 Blackf. 115. So, too, goods which have accrued by increase, and the offspring or produce of animals belonging to the deceased. Merchant, *Re*, 39 N. J. Eq. 506. Assets are not necessarily restricted to personalty which the deceased owned in his lifetime, but embrace, usually, the proper and just earnings and accretions of those assets, as they vest in the course of administration. Wms. Exrs. 1658.



201. **Contingent and executory interests of value, though they do not vest in possession, may vest in right so as to be transmissible to executors or administrators.**<sup>1</sup>

202. **Stock is in modern times usually treated as personal assets, notwithstanding the corporation, a railway, canal, or turnpike company, for instance, derive its profits in a certain sense from the use of real estate.**<sup>2</sup>

Rights under a contract are assets. *Stewart v. Chadwick*, 8 Iowa, 463; 3 Redf. (N. Y.) 100; 14 Iowa, 301; 2 Wash. 58, 25 P. 1077. Also claims for wages or a salary earned by decedent. *Lappin v. Mumford*, 14 Kan. 9; *Steger v. Frizzel*, 2 Tenn. Ch. 369. And see *Loring v. Cunningham*, 9 Cush. 87 (voted *post mortem*). Or one's patent rights and copyrights, subject to the terms of the statute relating thereto. 47 A. 289, 197 Penn. St. 335; 1 Schoul. Pers. Prop. §§ 518, 535. So with a government claim; distinguishing between what government may allow in satisfaction of something due the decedent and a mere statute bounty or gratuity to living kindred. 20 Pick. 67; 49 La. Ann. 1096, 22 So. 319; 47 Me. 79; 211, *post*. Cf. *Grant v. Bodwell*, 78 Me. 460, 7 A. 12; *Leonard v. Nye*, 125 Mass. 455; *Phelps v. McDonald*, 99 U. S. 298, 25 L. Ed. 473; 171 U. S. 466, 43 L. Ed. 243; 15 Tex. 98. Whatever chattel right one has with another, not subject to the rule of survivorship, is thus included. *Wms. Exrs.* 652; 1 Schoul. Pers. Prop. §§ 154-167. So is a deceased partner's interest in the partnership firm of which he died a member. *Wms. Exrs.* 651, 652; *Buckley v. Barber*, 6 Ex. 164; *Moses v. Moses*, 50 Ga. 9; *Caskie v. Harrison*, 76 Va. 85; *Schenkl v. Dana*, 118 Mass. 236. And see *Hutchinson v. Reed*, 1 Hoffm. (N. Y.) 316; 102 N. W. 1074, 124 Wis. 583. The usual rule is, that on the decease of a partner the partnership must be wound up and accounts settled between the surviving partner and the representative of the deceased member. 1 Schoul. Pers. Prop. § 194; 325. And see as to good will. *Platt v. Platt*, 42 Conn. 830; *Thompson v. Winnebago Co.*, 48 Iowa, 155. But see *Seighman v. Marshall*, 17 Md. 550; *Buck's Estate*, 185 Penn. St. 57, 64 Am. St. Rep. 616 (liquor license). And see 9 Mod. 459; *Wms. Exrs.* 1659. Damages assessed in favor of the deceased during his lifetime constitute assets. *Astor v. Hoyt*, 5 Wend. 603; *Welles v. Cowles*, 4 Conn. 182, 10 Am. Dec. 115. Also the right to bring a suit for damages suffered by the decedent, in respect of person or property. See Part IV, as to survival of actions, collection of assets, etc. And see 211, *post*; *Ives v. Beecher*, 52 A. 746, 75 Conn. 153 (judgment debt). And, in general, claims, demands, and causes of action of every kind, which survive by common law or statute, so that the personal representative may sue upon them, together with the incidental recompense or indemnity which may attend the suit. See 5 Gill & J. 102, 25 Am. Dec. 272; *Robinson v. Epping*, 24 Fla. 237.

Personal annuities, or annual payments of money not charged on real estate, constitute personal property, and the right to claim arrears goes to one's executor or administrator, subject to rules against apportionment. 1 Schoul. Pers. Prop. § 373; Co. Lit. 2 a; *Wms. Pers. Prop.* 5th Eng. Ed. 180-182. But as to a "rent charge," see 2 Bl. Com. 40, 41. It was formerly questioned whether annuities were realty or personalty. *Turner v. Turner*, Amb. 782. But this appears to be out of respect simply to the express terms of its creation. Like a life insurance policy, an annuity, when given without words of restriction, passes to the personal representative for the benefit of the estate. See *Wms. Exrs.* 809, 810.

<sup>1</sup> *Wms. Exrs.* 653, 887; 1 Ves. Sen. 236; *Fyson v. Chambers*, 9 M. & W. 460; 10 Pick. 268; *Ladd v. Wiggins*, 35 N. H. 421, 69 Am. Dec. 551; *Johns v. Johns*, 1 McCord. 132; *Dunn v. Sargent*, 101 Mass. 336. There may be a lapse, so that nothing valuable is actually transmitted. An option left open may be an asset. *Colgan's Estate*, 160 Penn. St. 140, 23 A. 646. But not a mere individual option. 46 S. E. 841, 119 Ga. 567.

<sup>2</sup> See 1 Schoul. Pers. Prop. §§ 480-482; 2 Y. & C. 268; *Weyer v. Second Nat. Bank*, 57 Ind. 198. To remove all doubt, the legislature, in acts of incorporation, frequently declares that the stock shall be considered personal property. *Wms. Exrs.* 811. As to dividends, see *Welles v. Cowles*, 4 Conn. 182, 10 Am. Dec. 115. And see *Wms. Exrs.*

203. Debts owing the deceased upon chattel security, such as pledge, mortgage, and lien to the testate or intestate, give the benefit of the security to the estate; and the security must not be left out of consideration in the assets.<sup>1</sup>

204. The decedent must have owned all such personal property or been the creditor or claimant at the time of his death, since otherwise the title cannot devolve upon his legal representative as assets; and the decedent's title, when he died, is the criterion of the title passing to his personal representative.<sup>2</sup>

205. If goods, money, or securities belonging to another person lie amongst the goods of the deceased, capable of identification, and they come altogether to the hands of the personal representative such other person's things are not to be reckoned among assets of the estate.<sup>3</sup> In order, however, that the third party or new fidu-

812, 813; 1 Schoul. Pers. Prop. §§ 478, 479. Cf. as to contract for stock, *Hitchcock v. Mosher*, 106 Mo. 578, 17 S. W. 638.

As to life insurance policies, see 211, *post*.

<sup>1</sup> Cf. *Saffran v. Kennedy*, 7 J. J. Marsh. 187; 32 Hun, 599; 90 N. C. 566. As to real estate security, see 214, *post*. Whatever a debtor may give the executor or administrator, to secure or discharge what he owes, belongs to the estate.

Debts, on the other hand, owing from the deceased, and secured by pledge or mortgage of his personal property, or a lien thereon, leaves the surplus as general assets of the estate beyond such sum as may be required for discharging the security; or, as one might say, the personal property given in security constitutes assets, subject to the preferential claim of the secured creditor. *Wms. Exrs.* 1660; 2 Stark. N. P. 507; *Haynsworth v. Frierson*, 11 Rich. (S. C.) 476. See 96 Ga. 625; *Bristol Bank v. Holley*, 58 A. 691, 77 Conn. 225.

<sup>2</sup> Thus, notes, securities, or other incorporeal property *bona fide* and regularly transferred to others by the decedent during his lifetime, and indorsed, assigned, or delivered, with mutual intention that the title should so pass, do not vest in the representative of the deceased; and the same may be said of corporeal goods and chattels, duly delivered upon a like understanding, by the decedent. *Wms. Exrs.* 1675; 1 Salk. 79; *Thomas v. Smith*, 3 Whart. 401; *Garner v. Graves*, 54 Ind. 188; *Burke v. Bishop*, 27 La. Ann. 465, 21 Am. Rep. 567. But as to fraudulent assignments, see 297, *post*. For sale on the instalment plan with title still in seller, see 50 S. E. 100, 122 Ga. 312. And see as to equitable owner, 105 N. W. 295, 74 Neb. 704. But since legal transfer implies parting with dominion over the thing, any professed transfer during one's life which left the possession, control, and power to revoke in the transferor, keeps his title virtually undivested, so that at his decease the chattel must be administered as assets. 4 Ves. 6; *Cummings v. Bramhall*, 120 Mass. 552; *Madison v. Shockley*, 41 Iowa, 451. And see as to a bailment, *Bigelow v. Paton*, 4 Mich. 170; *Sherman v. Sherman*, 3 Ind. 337. See also *Coverdale v. Aldrich*, 19 Pick. 391 (trustee process). Advancements made during life to children are regarded essentially as gifts, so as not to be reckoned among assets of the estate. 499, 500, *post*. A savings bank deposit belonging to a donee is not assets of the donor, even though the donee may have to recover it from the bank in the name of the donor's representative. 72 N. E. 333, 186 Mass. 584; *Watson v. Watson*, 69 Vt. 243, 39 A. 201.

<sup>3</sup> *Wms. Exrs.* 1675; *Cooper v. White*, 19 Ga. 554; *Shakespeare v. Fidelity Co.*, 97 Penn. St. 173. Nor is money collected by an attorney, factor, or agent, and kept distinct and unmixed with the rest of his property. *Schoolfield v. Rudd*, 9 B. Mon. 291. So property held by a trustee or fiduciary officer is not assets of his estate; but a new trustee should rather be appointed to hold the fund in the stead of the decedent. 1 Sumn. 133; *Johnson v. Ames*, 11 Pick. 173; *Green v. Collins*, 6 Ired. L. 139; *Thomp*

ciary may claim his specific thing as separable from assets, its identity should have been preserved.<sup>1</sup>

206. **Personal property of the decedent in the possession or control of a third person**, whether rightfully or wrongfully, at the time of death, will, on the other hand, vest as assets in the executor or administrator of the owner; and to him the custodian should surrender possession; though here, once more, the decedent's property must be capable of identification, else there is left but a right of action to recover their value or damages.<sup>2</sup>

207. **Notwithstanding an ultimate title of legatees or distributees**, personal property continues assets for administration.<sup>3</sup>

208. **A debt due from the representative to the decedent** constitutes assets, under most modern statutes, and the debtor who qualifies is held accountable accordingly.<sup>4</sup> But by the common law, the appointment of one's debtor to be the executor of the will was held to extinguish the debt, though such favor did not apply to a mere administrator.<sup>5</sup> A debt due the deceased from a legatee or

son v. White, 45 Me. 445; Wms. Exrs. 1675; Belt's Estate, 70 P. 74, 29 Wash. 535, 92 Am. St. Rep. 916 (trust funds); 91 N. W. 172, 131 Mich. 213; 56 A. 773, 25 R. I. 509.

<sup>1</sup> If the deceased held money or other property in his hands belonging to others, whether in trust or otherwise, and it has no ear-mark and is not distinguishable from the mass of his own property, it falls within the description of assets; in which case the other party must come in as a general creditor. Story, J., in *Trecothick v. Austin*, 4 Mason, 29; 11 Pick. 172. Where a life beneficiary invests the capital and income as one fund, the division of the property at her death is largely a question of convenience. 65 N. H. 139, 23 A. 85. Cf. *O'Brien v. N. E. Trust Co.*, 66 N. E. 794, 183 Mass. 186.

A peculiar rule applies as to property in the receiver of letters, as to assets; for the sender is interested. 35 Barb. 502; 2 Atk. 342.

<sup>2</sup> *Bean v. Bumpus*, 22 Me. 549 (deceased minor's guardian); *Harrison v. Harrison*, 84 P. 381, 73 Kan. 25, 117 Am. St. Rep. 453. See 60 A. 437, 101 Md. 148 (identified asset, though placed nominally in a corporation).

<sup>3</sup> *Woodfin v. McNealy*, 9 Fla. 256; 22 Me. 549; 136 Mass. 54. Representative may bring replevin. *Pritchard v. Norwood*, 155 Mass. 539, 30 N. E. 80. And see 61 A. 287, 69 N. J. Eq. 743; 220, *post*.

<sup>4</sup> *McCarty v. Frazer*, 62 Mo. 263; *Adair v. Brimmer*, 74 N. Y. 539; 59 N. Y. 142 (security maintained); *Hodge v. Hodge*, 38 A. 535, 90 Me. 505, 60 Am. St. Rep. 285, 40 L. R. A. 33; 27 So. 465, 124 Ala. 550, 82 Am. St. Rep. 199; *Jacobs v. Woodside*, 6 Rich. 490; *Shields v. Odell*, 27 Ohio St. 398; 100 N. Y. S. 215; 144 Fed. 308. And see English stat. 1 Vict. c. 26, § 7; 20 & 21 Vict. c. 77, § 79; Wms. Exrs. 15, 286, 1312. As to joint representatives, see *Bassett v. Granger*, 136 Mass. 175. And see *Hines v. Hines*, 95 N. C. 482; *Judge v. Sulloway*, 68 N. H. 511, 73 Am. St. Rep. 619, 49 L. R. A. 347, 44 A. 720.

<sup>5</sup> 1 Salk. 299, 306; *Cheetham v. Ward*, 1 B. & P. 630; Co. Lit. 264 b. Perhaps, where the executor renounced, the rule was different. Intendment of the will appears to be the true reason; but that alleged by the courts was, that the rights of debtor and creditor united technically in one and the same person. Wms. Exrs. 1310. In some States it is said that as soon as the debtor is appointed, if he acknowledges the debt, he has actually received so much money and is answerable for it, he and the sureties of his probate bond, in like manner, as if he had received it from any other

distributee is furthermore reckoned as assets by the modern rule, in the absence of evidence that forgiveness of the debt was intended; and for realizing upon this indebtedness, the legacy or surplus accruing to such person may afford good security.<sup>1</sup>

209. **With all personal assets coming to his knowledge**, the representative is chargeable, because of the trust he has accepted;<sup>2</sup> and the want of actual possession does not dispense with prudent attempts on his part to collect, enforce, or obtain possession. All the chattels of the deceased, wherever situated, are assets, if the representative, by reasonable diligence, considering the means of the estate already under his control, might have possessed himself of them.<sup>3</sup>

210. **But where the decedent's own title was a qualified one**, the rule of assets requires a corresponding qualification.<sup>4</sup> This is in general conformity with the laws which regulate the transfer and transmission of title to personal property.<sup>5</sup>

debtor of the deceased. 11 Mass. 269; Leland v. Felton, 1 Allen, 531; Hall v. Hall, 2 McCord Ch. 269; 99 S. W. 1156, 30 Ky. Law, 1020. Indeed, the liability to duly account for such a debt is assumed on acceptance of the office. 1 Allen 531. Yet the return of a debt in the inventory as solvent is usually *prima facie* proof that it exists and is collectible, and by no means conclusive proof that it has been collected. The more consistent rule appears to be that the return of the inventory affords a presumption only, and that if the representative shows that he cannot pay, and has not paid, he need not be charged with the debt as cash. Baucus v. Stover, 24 Hun, 109; 92 N. W. 760, 66 Neb. 575, 61 L. R. A. 313; United States v. Eggleston, 4 Sawyer, 199; 3 Dem. 610; 542. See further, Shields v. Odell, 27 Ohio St. 398 (*de bonis non*); Tarbell v. Jewett, 129 Mass. 457; Robinson v. Hodgkin, 99 Wis. 327, 74 N. W. 791. As to judgment debtor, see Charles v. Jacob, 9 S. C. 295 (extinguishment); Anderson v. Anderson, 38 A. 1007, 183 Penn. St. 480.

<sup>1</sup> *Post*, 248, 492 *a*; Wms. Exrs. 1303, 1304; 29 Penn. St. 208; 184 Mass. 210, 68 N. E. 205, 100 Am. St. Rep. 552; Hallowell's Estate, 23 Penn. St. 223.

Where the partner of a firm or the officer of a corporation, owing the deceased a debt, becomes executor or administrator, the indebtedness becomes assets in his hands. Eaton v. Walsh, 42 Mo. 272; James v. West, 65 N. E. 156, 67 Ohio St. 28.

<sup>2</sup> See 146.

<sup>3</sup> Gray v. Swain, 2 Hawks. (N. C.) 15; Tuttle v. Robinson, 33 N. H. 104; Palmer v. Palmer, 55 Mich. 293, 21 N. W. 352. Ancillary letters are available for property out of the jurisdiction, if prudence so requires. 175, *supra*.

On the other hand, chattels of the deceased, not procured from the possession of others, and debts uncollected, do not constitute available assets in the hands of his executor or administrator, where he can show that there has not been culpable negligence or remissness in the trust on his part. Tuttle v. Robinson, 33 N. H. 104; Ruggles v. Sherman, 14 Johns. 446. As to the fiduciary standard here applicable, see Part IV, *post*.

<sup>4</sup> See 110 S. W. 1100, 131 Mo. App. 178 (imperfect gift by decedent); Benner's Will, 113 N. W. 663, 133 Wis. 325 (bequest in right but not possession); Morris v. Wucher, 80 N. E. 1114, 188 N. Y. 568 (completed gift).

<sup>5</sup> See *e.g.*, as to a debt or legacy going to a survivor, Green v. Green, 3 Sm. & M. 256; Walk. (Mich.) 64. As to a deceased partner's interest in his partnership firm, see 200. Special fund for widow under a will. 25 S. W. 114, 15 Ky. Law, 710. See also as to a fund in which others are interested, 165 Penn. St. 423, 30 A. 1011. See 2 Schoul. Pers. Prop., §§ 1-3.

211. In various cases the representative does not hold strictly as assets, even though technically suing for the fund.<sup>1</sup>

212. Real estate becomes vested on the death of the owner in his heirs or devisees, and the executor or administrator has as such no inherent power over it at common law. Lands, therefore, are not in a primary sense assets, to be appropriated for the benefit of creditors; nor has chancery a jurisdiction to decree their sale at the suit of a creditor, unless he has some specific lien or right therein.<sup>2</sup> It is only as legislation, or the will of a testator may have conferred an express power upon the executor or administrator, that he can exert it in respect of real estate, unless authority has been conferred by the heirs or devisees themselves.<sup>3</sup> But modern enactments, as we shall see hereafter, usually permit the lands of a deceased owner to be subjected to the satisfaction of his just debts, in so far as the personalty falls short of paying them, and general provision is made for sale by the executor or administrator under a judicial license accordingly.<sup>4</sup>

<sup>1</sup> See *e.g.*, *post*, 447, as to a widow's paraphernalia, allowances, etc. As to property exempt from administration, see *Taylor v. Pettus*, 52 Ala. 287; *Heard v. Northington*, 49 Tex. 439; 113 F. 766; 57 S. W. 210, 67 Ark. 239.

The proceeds of a life insurance policy taken out by the decedent and expressed to be payable to another, as, for instance, to his widow or a child, or in trust for such a one's benefit, are not assets of the estate; though it may be that suit should be brought *pro forma* in the representative's name on behalf of the beneficiary named. 2 Redf. (N. Y.) 302; *Cables v. Prescott*, 67 Me. 582; 42 Hun, 326; 19 Fed. 671; *Golder v. Chandler*, 87 Me. 63, 32 A. 784; *Wright v. Life Ins. Co.* 164 Mass. 302, 41 N. E. 303; 50 S. E. 644, 71 S. C. 123; 67 S. W. 814, 105 Tenn. 316. But where the person insured takes out life insurance generally, and not for the express benefit of others surviving him, or where the beneficiaries named have predeceased, the fund goes properly to legal representatives for the benefit of the estate, and becomes assets for the payment of debts. *Hathaway v. Sherman*, 61 Me. 466; *Butson, Re*, 9 L. R. Ir. 21; *Wright v. Wright*, 100 Tenn. 313, 45 S. W. 672. Pensions and public gratuities, or pay for army and navy service, are often made payable under express statute for the direct benefit of widow, children or parents. *Perkins v. Perkins*, 46 N. H. 110. Modern statutes give compensation to the widow, children, etc., of one killed, by the tort of a person or corporation. Such a cause of action does not strictly belong to the estate as concerns the fund. 74 N. W. 50, 53 Neb. 674; 107 N. W. 608, 130 Iowa. 533; 63 A. 339, 72 N. J. L. 480; 45 S. E. 894, 102 Va. 201. See further, 3 Sim. 97; *Hassall v. Smithers*, 12 Ves. 119; 5 Dem. (N. Y.) 326; *Bishop v. Curphey*, 60 Miss. 22 (money due from benefit associations).

<sup>2</sup> *Wms. Exrs.* 650; 4 Mass. 354; *Lucy v. Lucy*, 55 N. H. 9; *Laidley v. Kline*, 8 W. Va. 218; *Hankins v. Kimball*, 57 Ind. 42; *McPike v. Wells*, 54 Miss. 136; *Le Moyne v. Quimby*, 70 Ill. 399; *Sheldon v. Rice*, 30 Mich. 296, 18 Am. Rep. 136; 145 Mo. 418, 46 S. W. 1000; 54 Neb. 33, 74 N. W. 391; 98 Wis. 385, 74 N. W. 118. And see 122 N. C. 536, 29 S. E. 951; 100 Ga. 607, 28 S. E. 288 (no right to purchase land for next of kin, etc.); *Glasscock v. Gray*, 62 N. E. 433, 148 N. C. 346.

<sup>3</sup> As to power under a will, see 5 Whart. 228, 350.

<sup>4</sup> See *post*, Part VI, c. 2, as to sale of lands under license, etc., with strict requirements. *McPike v. Wells*, 54 Miss. 136; *Shup v. Calvert*, 174 Ill. 500, 51 N. E. 828; 70 Ill. 399.

213. It follows that if the representative takes possession of the real estate of the deceased, he is accountable to the heirs or devisees as their agent, and not, strictly speaking, to the probate court in his official capacity; though for convenience he will often manage as by consent of the heirs or devisees.<sup>1</sup>

214. Where one dies seized of real estate incumbered by a mortgage, the land descends to heirs or devisees subject to that special incumbrance, and the equity of redemption vests in them. If such mortgage be afterwards foreclosed and the land sold, any surplus on the sale is regarded also as realty, and goes to them.<sup>2</sup> As for a mortgagee of real estate, such mortgage before foreclosure is only security in the representative's hands for indebtedness or a

<sup>1</sup> 2 Rawle, 222, 19 Am. Dec. 640; *Kimball v. Sumner*, 62 Me. 309; *Lucy v. Lucy*, 55 N. H. 9; *Palmer v. Palmer*, 13 Gray, 328; *Kidwell v. Kidwell*, 84 Ind. 224. It is often of advantage to the heirs to permit the representative to collect rents, and this course may save sometimes the sale of the real estate to pay debts. And see (himself an heir) *Schwartz's Estate*, 14 Penn. St. 42; *Coann v. Culver*, 80 N. E. 362, 188 N. Y. 9. In some States the personal representative is expressly authorized by statute to collect rents and take control of the real estate of the deceased during the settlement of the estate. *Kline v. Moulton*, 11 Mich. 370; *Head v. Sutton*, 31 Kan. 616, 3 P. 280. And see 510.

The representative cannot recover possession of the lands of the deceased by a suit at law. *Drinkwater v. Drinkwater*, 4 Mass. 354. Nor a homestead set apart for the wife. 120 Cal. 421, 52 P. 708. Heirs, and not the administrator, should enforce a trust in land in favor of the decedent. *Field v. Andrada*, 106 Cal. 107, 39 P. 323. Or a writ of entry brought by demandant, so far as the right to sue may continue. 152 Mass. 257, 25 N. E. 468.

But money due the decedent for land which he sold when alive is personalty. 137 Penn. St. 454, 457, 20 A. 623; 46 S. E. 829, 119 Ga. 607.

Nor has the executor or administrator an inherent right to enforce the specific performance of a contract to convey land to his decedent. *Carpenter v. Popper*, 94 Wis. 146, 68 N. W. 874. Land clearly conveyed by the decedent during life is not available for administration purposes even though the deed was not recorded until after his death. 167 Mass. 205, 45 N. E. 351. Land conveyed in fraud of creditors forms no part of the deceased grantor's estate, and it is the creditors, not the administrator, who should attack the conveyance. *Willis v. Smith*, 65 Tex. 656; *Stam v. White*, 81 S. W. 1127, 183 Mo. 464; 297, *post*. But statutes sometimes extend the representative's right in this respect. 69 A. 133, 81 Vt. 97; 86 N. E. 360, 200 Mass. 293; 122 N. C. 683, 29 S. E. 949; 150 Ind. 260, 49 N. E. 1050; 71 Wis. 148, 36 N. W. 624. And whatever means a creditor may lawfully pursue in order to render the heirs of the deceased liable with the personal representative to settle his demand, all personal assets of the estate must be exhausted before resort can be had to the realty. *Hoffman v. Wilding*, 85 Ill. 453; Part VI, c. 2, *post*. But in a few States real and personal property have been treated more alike. *Tate v. Norton*, 94 U. S. 746, 24 L. Ed. 222; 3 Sawyer 206; *Vincent v. Platt*, 5 Harring. 164; *Jones v. Wightman*, 2 Hill (S. C.) 579; *Jennings v. Copeland*, 90 N. C. 572. See 78 N. W. 941, 58 Neb. 457; 40 A. 1063, 68 N. H. 412; 49 A. 1085, 62 N. J. Eq. 314.

<sup>2</sup> *Dunning v. Ocean Nat. Bank*, 61 N. Y. 497, 19 Am. Rep. 293. And see 2 Sandf. 561; *Heighway v. Pendleton*, 15 Ohio, 735; *Clark v. Seagraves*, 71 N. E. 813, 186 Mass. 430; 99 N. W. 514, 71 Neb. 732. See further, *Johnson v. Patterson*, 13 Lea, 626; *Sayers's Appeal*, 79 Penn. St. 428; 74 Penn. St. 391, 15 Am. Rep. 553; 1 Bradf. (N. Y.) 495.

liability, and equity treats it as a chattel interest, which passes like the principal *chose in action*.<sup>1</sup>

215. Land set off to an executor or administrator upon an execution recovered by him on a debt which was due to the deceased personally, appears to follow the same rule as in the representative's foreclosure of a mortgage.<sup>2</sup>

216. The profits and income of real estate, incidental to its beneficial enjoyment, follow by operation of law the title to the premises.<sup>3</sup>

217. In general, the character of property, whether as real or personal, is that impressed upon it at the death of the testate or intestate, and does not change by any subsequent conversion in the course of administration.<sup>4</sup> Indeed, a testator cannot alter the legal character of his real or personal property by directing that it shall be considered of the one class instead of the other.<sup>5</sup>

<sup>1</sup> Wms. Exrs. 687; 11 Gill & J. 185; 14 Pick. 399; Steel v. Steel, 4 Allen, 417; Burton v. Hintrager, 18 Iowa, 348. And see Longuet v. Scawen, 1 Ves. Sen. 406 (Welsh mortgage). Statutes sometimes emphasize this rule. The representative forecloses on behalf of the estate. 4 Mass. 598; Taft v. Stevens, 3 Gray, 504; Harper v. Archer, 28 Miss. 212; 69 A. 694, 103 Me. 410; 52 S. W. 296, 103 Tenn. 1, 48 L. R. A. 130.

<sup>2</sup> Boylston v. Carver, 4 Mass. 598; Taft v. Stevens, 3 Gray, 504. Local statutes confirm this rule. Williamson v. Furbush, 31 Ark. 539.

<sup>3</sup> Rents accruing previous to the lessor's death belong to his personal representative, and those accruing after his death to the heir or devisee. *Supra*, 213; Peck v. Ingersoll, 7 N. Y. 528; Stinson v. Stinson, 38 Me. 593; Sparhawk v. Allen, 25 N. H. 261; 16 Mass. 280; 1 Bradf. 241; Robb's Appeal, 41 Penn. St. 45; King v. Anderson, 20 Ind. 385; Foltz v. Prouse, 17 Ill. 487; Foteaux v. Lepage, 6 Iowa, 123; Smith v. Bland, 7 B. Mon. 21; Fleming v. Chunn, 4 Jones Eq. 422; Bloodworth v. Stevens, 51 Miss. 475; Crane v. Guthrie, 47 Iowa, 542; 80 Ala. 388. So, too, where rent is payable in kind. Cobel v. Cobel, 8 Penn. St. 342. But cf. Wadsworth v. Allcott, 6 N. Y. 64 (payment in crops). So, too, a lessor's claim for damages accruing after his death goes with the title to the heir or devisee. Kernochan v. Elevated R., 128 N. Y. 559, 29 N. E. 65; 218, *post*. As to leases and a deceased lessee, see 223.

<sup>4</sup> Hamer v. Bethea, 11 S. C. 416; Rogers v. Paterson, 4 Paige, 409.

<sup>5</sup> Wms. Exrs. 657; 1 B. & C. 364; Johnson v. Arnold, 1 Ves. 171.

In equity, however, that which should have been done is treated in many instances as actually done. An equitable conversion may take place, therefore, subsequently to the testator's death; but this is not favored, nor extended upon inference. Accordingly, a testator's direction to convert his real estate into personalty, for specified purposes, must be restricted to those objects if not absolute and any surplus proceeds after execution of the power will go as realty. Wms. Exrs. 658; Fletcher v. Ashburner, 1 Bro. C. C. 497; 1 Ves. & Bea. 173. And see Foster's Appeal, 74 Penn. St. 391, 15 Am. Rep. 553; 4 Thomp. & C. (N. Y.) 410; Smith v. Presby. Church, 26 N. J. Eq. 132; Hammond v. Putnam, 110 Mass. 235; Phelps v. Pond, 23 N. Y. 69. Again, there may be a constructive conversion of real into personal, or personal into real, property, at the time of the testator's decease. Hammond v. Putnam, 110 Mass. 232, and cases cited. In the administration of an intestate estate, the rule of equitable conversion is of little or no practical consequence. But in administration under a will it may be found of much importance. See Johnson v. Woods, 2 Beav. 409; Collier v. Collier, 3 Ohio St. 369; 110 Mass. 36; Wms. Exrs. 658-662; 26 N. J. Eq. 132; 23 N. Y. 69; Craig v. Leslie, 3 Wheat. 562, 4 L. Ed. 460; Dodson v. Hay, 3 Bro. C. C. 404. Cf. Bective v. Hodgson, 10 H. L. Cas. 667; 3 H. L. Cas. 524. There may be an equitable interest in land which passes to the executor or administrator and is assignable by him. Atkinson v. Henry, 80 Mo. 670.

218. Other instances of the character of property at the owner's death are worth noticing.<sup>1</sup>

219. A gift of personal property *causa mortis*, which differs from ordinary gifts in being made with an anticipation of imminent death, and constituting a sort of ambulatory disposition by delivery without the essential formalities of a will, carries two distinct consequences, when fully executed and followed by the donor's death; one with respect to the donee himself, the other as concerns creditors of the estate.<sup>2</sup>

220. Insolvency of the decedent does not affect the representative's right to assert in a court of equity an equitable title to property

<sup>1</sup> As to a deed executed by the vendor of real estate and held as an escrow before he dies, see *Teneick v. Flagg*, 29 N. J. L. 25; 1 B. & Ald. 606. A mere contract for the sale of land passes, as a beneficial right for enforcement, to the executor, as between him and the heir or devisee, for it is personalty, while the estate to the land vests, in equity, in the vendee, and in case of the latter's death goes to his heirs, and not to the personal representative. 34 Barb. 173; *Williams v. Haddock*, 145 N. Y. 144, 39 N. E. 825; 88 N. W. 384, 129 Mich. 177, 95 Am. St. Rep. 427; 10 Am. Dec. 343. And see *Wright v. Minshall*, 72 Ill. 584. Remainder-man after a life estate becomes at once entitled to possession of the land, regardless of executor. 60 S. E. 261, 130 Ga. 120. Damages assessed in favor of land taken for public uses, before the owner's death, though not made payable until after his death, pass as assets to the executor or administrator; but otherwise, if the land was not taken until after the owner's death. *Astor v. Hoyt*, 5 Wend. 603; *Welles v. Cowles*, 4 Conn. 182, 10 Am. Dec. 115; *Goodwin v. Milton*, 25 N. H. 458; *Neal v. Knox R. Co.*, 61 Me. 298. So, if a person sells real estate and dies afterwards, that portion of the purchase-money which remains unpaid must be treated as personal property and assets, however the same may have been secured. *Loring v. Cunningham*, 9 Cush. 87; 213 *n. supra*; *Henson v. Ott*, 7 Ind. 512; 2 Edw. 597; 25 Penn. St. 466. And see *Jacobus v. Jacobus*, 37 N. J. Eq. 17 (interest in land vested under partition proceedings.) Note local statute as to suit on land damages. 101 S. W. 127, 123 Mo. App. 545. As to life support out of land conveyed, see 104 S. W. 982, 32 Ky. Law, 159. And see 85 P. 87, 36 Col. 35 (trespass for injury to land).

Insurance money paid to the heirs on a fire insurance of the decedent's real estate, the buildings being burned after his death, vests in the heirs, like the realty, and constitutes no part of the ordinary personal assets of the deceased. *Wyman v. Wyman*, 26 N. Y. 253; *Harrison v. Harrison*, 4 Leigh, 371. And see 42 Hun (N. Y.) 423 (life estate). But if the buildings were burned while the decedent was alive, any claim, for unpaid insurance money should, on principle, constitute assets for the personal representative to collect and administer upon.

<sup>2</sup> As concerns the donee, his title is derived directly from the donor and not from the donor's executor or administrator, consequently, the assent of such representative after the donor's death is not in any way essential to the donee's title. *Gaunt v. Tucker*, 18 Ala. 27; *Michener v. Dale*, 23 Penn. St. 59; *Westerlo v. De Witt*, 36 N. Y. 340, 93 Am. Dec. 517. See *Wadsworth v. Chick*, 55 Tex. 241. At the same time the executor or administrator of an alleged donor has corresponding rights against all persons retaining property of the deceased under the fictitious claim of donees *causa mortis*, and it is his duty to dispossess them. *Egerton v. Egerton*, 17 N. J. Eq. 419. But with regard to a donor's creditors, the universal principle is, as in the case of gifts *inter vivos*, that the transfer shall not be allowed to defeat the just claims of creditors. § 193; *Wms. Exrs.* 770-783; 1 P. *Wms.* 406; 2 Ves. Sen. 434; 23 Penn. St. 59; 86 S. W. 367, 38 Tex. Civ. 487; *Chase v. Redding*, 13 Gray, 418; *Borneman v. Sidlinger*, 15 Me. 429, 33 Am. Dec. 626. The general topic of gifts *causa mortis* is fully treated in 2 Schoul. Pers. Prop., §§ 135-198.



whose legal title was in the decedent during his lifetime.<sup>1</sup> But generally speaking, property which has been assigned or conveyed by the deceased, after the manner of a gift, confers a title upon the donee or grantee, subject to the lawful demands of prior existing creditors of the estate. The executor or administrator, representing these and other interests against the express or implied wishes of the deceased himself, if need be, may and ought to procure all assets suitable for discharging demands of this character.<sup>2</sup>

221. **Between legal assets and equitable assets of an estate** the English law has taken some pains to discriminate; referring to the latter head, such assets as are liable only by the help of a court of equity, and not recognized as assets at law.<sup>3</sup>

222. **Where a person has a general power of appointment and executes that power**, the property appointed is deemed in equity part of his assets, and rendered subject to the demands of his creditors in preference to the claims of his voluntary appointees or legatees.<sup>4</sup>

223. **Chattels real vest in the executor or administrator of the lessee**, whether as a valuable beneficial and assignable interest, which may be disposed of at a profit, or as involving rather a burdensome obligation to be discharged out of the decedent's

<sup>1</sup> *Long v. King*, 117 Ala. 423, 23 So. 534; *Cross v. Brown*, 51 N. H. 486; *Welsh v. Welsh*, 105 Mass. 229; also, *Gilman v. McArdle*, 99 N. Y. 451, 2 N. E. 464, 52 Am. Rep. 41.

<sup>2</sup> 297, *post*, as to setting aside fraudulent conveyances by the decedent, etc. If any balance is thus left over, it goes, not to the next of kin, but to the donee; for the revocation of any gift for the benefit of creditors of the decedent is only *pro tanto*. *McLean v. Weeks*, 61 Me. 277; *Abbott v. Tenney*, 18 N. H. 109; *Reade v. Livingston*, 3 Johns. Ch. 481, 8 Am. Dec. 520; 2 Schoul. Pers. Prop. §§ 111-123; *Burtch v. Elliot*, 3 Ind. 100; *Bassett v. McKenna*, 52 Conn. 437. See further, 297, *post*, §§ 219 a, 220. Questions of this character properly concern the settlement of the estates of those who die insolvent. As a general rule, whatever the decedent has fully given away without expectation of repayment is not due the estate as assets. *Kelsey v. Kelley*, 63 Vt. 41, 22 A. 597.

<sup>3</sup> The point of the distinction lies in this: that courts of equity disapprove those rules of priority among creditors which were early established by the common-law tribunals and ranked all debts alike, whether founded in specialty or simple contract, this being most consonant to natural justice. Wms. Exrs. 1680-1685. American courts of equity rarely, if ever, enforce such a distinction; the old rules of priority having, instead, been altered by suitable enactments in most parts of the United States, or else rendered as tolerable as possible by being administered with uniformity. See 417 as to payment of debts; 1 Ashm. 347. And see further, Wms. Exrs. 1682; 4 Ves. 541; 2 Vern. 763; Story Eq. Jur. § 551; 1682; *Cook v. Gregson*, 20 Jur. 510; *Bain v. Sadler*, L. R. 12 Eq. 570; *Dunham v. Milhouse*, 70 Ala. 596.

<sup>4</sup> *Clapp v. Ingraham*, 126 Mass. 200, 202, *per* Gray C. J., with citations; 3 Atk. 269; 3 De G. M. & G. 976; *Johnson v. Cushing*, 15 N. H. 298, 41 Am. Dec. 694; *Commonwealth v. Duffield*, 12 Penn. St. 277, 279-281; Wms. Exrs. 1686.

estate.<sup>1</sup> As assets, leases have, however, peculiar incidents.<sup>2</sup>

224. **Chattels which never vested in possession in the decedent may nevertheless come to his representative by remainder as assets;** as if a lease should run to A. for life, with remainder to his executor for years.<sup>3</sup>

225. **Heirlooms as assets are on the border line which separates real and personal estate at common law.** The three classes here noticeable are (1) heirlooms, (2) emblements, and (3) fixtures.<sup>4</sup>

226. **Next, as to "emblements," or chattels vegetable and growing crops,** the rule is, that when the owner of real estate dies, trees and their fruit and produce, if hanging on the trees at the time of his death, also hedges and bushes, go to the heirs or devisees and not to the executor or administrator; the reason being that they are part of the real estate and not chattels.<sup>5</sup> But out of favor to agriculture, and to aid the intentions of one who has bestowed labor upon a crop which by reason of some unforeseen contingency is beyond his control, the unsevered property is sometimes treated as though already severed: a rule which obtains with much force as between tenant and landlord, where the tenancy has unexpectedly determined by act of God or the act of the law.<sup>6</sup>

<sup>1</sup> Of chattels real the only important one in modern times is the lease. *Murdock v. Ratcliff*, 7 Ohio, 119; 1 Schoul. Pers. Prop. §§ 6, 7, 20; *Lewis v. Ringo*, 3 A. K. Marsh. (Ky.) 247; *Thornton v. Mehrling*, 117 Ill. 55, 25 N. E. 958; *Faler v. McRae*, 56 Miss. 227. See as to estate for another's life, etc., 33 Barb. 277; *Wms. Exrs.* 674, 681. And see *Rickard v. Dana*, 52 A. 113, 74 Vt. 74 (lease with option to purchase); *Ring's Estates*, 109 N. W. 710 (Iowa, 1906); 134 F. 470; *Cormick v. Stephany*, 57 N. J. Eq. 257, 41 A. 840. The good-will of an established business and a leasehold interest go often together as valuable assets. *Wiley's Appeal*, 8 W. & S. 244. So, too, the good-will of a renewal of the lease should if valuable, be included. *Green v. Green*, 2 Redf. (N. Y.) 408.

<sup>2</sup> See 1 Grant (Pa.) 320; 3 Redf. (N. Y.) 450; 6 C. B. 756; *Bowes, &c.*, 37 Ch. D. 128.

<sup>3</sup> Com. Dig. Assets C; *Wms. Exrs.* 1658. See *Gee v. Hasbrouck*, 87 N. W. 621, 128 Mich. 509.

<sup>4</sup> Heirlooms are not favored in American law, and so far as such things cannot be treated as strict fixtures, their title seems to have been excepted from the ordinary rules of devolution upon death, out of favor to the heir, in accordance with some local custom which gratified family pride. 1 Schoul. Pers. Prop. §§ 95-99; 2 Bl. Com. 427; *Wms. Pers. Prop.* 12. Whatever may be pronounced heirlooms, such as ancestral armor or portraits, title deeds, and the like, go with real estate to the heir, and the executor or administrator cannot treat them as assets more than the real estate itself. 1b.; 5 Ves. 806; *Harrington v. Price*, 3 B. & A. 170; 11 W. R. 291; *Tipping v. Tipping*, 1 P. *Wms.* 730.

<sup>5</sup> 1 Schoul. Pers. Prop. § 102; *Wms. Exrs.* 707; *Rodwell v. Phillips*, 9 M. & W. 501; *Maples v. Milton*, 31 Conn. 598; 3 Johns. 216, 3 Am. Dec. 478; *Shofner v. Shofner*, 5 Sneed. 94; *Fetrow v. Fetrow*, 50 Penn. St. 253. And see *Budd v. Hiler*, 27 N. J. L. 43.

<sup>6</sup> *Washb. Real Prop.* 104 *et seq.*; 1 Schoul. Pers. Prop. §§ 101-105. Crops not actually sown or planted, grass, etc., are not included. 1 Hayw. (N. C.) 17; *Rodman v. Rodman*, 54 Ind. 444; *Kain v. Fisher*, 6 N. Y. 597; *Evans v. Inglehart*, 6 Gill & J. 188. But as to growing crops, grain, vegetables, etc., see 7 Mass. 34, 5 Am. Dec. 21;

227. **Fixtures constitute, of things at the border line of real and personal**, the most important class at the present day, the very word, now so common in legal parlance, being of modern origin and variously defined, but, on the whole, signifying chattels annexed in a manner to the ground, concerning which the right to remove comes in controversy.<sup>1</sup>

228. **The rule as to assets in a foreign jurisdiction** we have already had occasion to consider.<sup>2</sup>

Ring's Estate, 109 N. W. 710 (Iowa, 1906); *Humphrey v. Merritt*, 51 Ind. 197; *Wadsworth v. Allcott*, 6 N. Y. 84; *Thornton v. Burch*, 20 Ga. 791; *Singleton v. Singleton*, 5 Dana, 92; *Wms. Exrs.* 711; *Evans v. Roberts*, 5 B. & C. 832; *Gwin v. Hicks*, 1 Bay (S. C.) 503. Local statutes are found on this subject. While an administrator may gather the crop of the intestate, he is not obliged to do so, and if he does not it is not assets. *Blair v. Murphree*, 81 Ala. 454. If he gathers, he must account strictly. With crops planted and grown after the death of the owner, administration has nothing to do. *Kidwell v. Kidwell*, 84 Ind. 224.

As to the grant of growing trees and a constructive severance, see 4 Co. 63 b; *Wms. Exrs.* 708. And see *Swinburn v. Ainslee*, 28 Ch. D. 89 (trees blown down, etc.).

<sup>1</sup> The object and purpose of the annexation must be considered in all cases of fixtures; and the law is more or less liberal, as to treating the thing as a personal asset. See this subject treated at length in 1 Schoul. Pers. Prop. §§ 111-129; *Elwes v. Maw*, 3 East. 32; s. c., 2 Smith Lead. Cas., Am. Notes, 228; *Wms. Exrs.* 728 *et seq.*; *Clark v. Burnside*, 15 Ill. 62. Chattels lying on the ground or clearly detached, at the death of the owner, vest, of course, in his executors and administrators as personal assets; while the land itself, and permanent erections thereon, go to the heir or devisee. *Winslow v. Merchants' Ins. Co.*, 4 Met. 314; *Sheen v. Rickie*, 5 M. & W. 175. See as to manure, *Fay v. Muzzev*, 13 Gray, 53, 74 Am. Dec. 619; *Plumer v. Plumer*, 30 N. H. 558. Annexation is not a conclusive test as apart from fitness; e.g., doors, blinds, keys, etc., of a house.

To classify on this somewhat abstruse subject, there are two kinds of disputes which may concern the representative of a deceased person: (1) where controversy arises between him and the heir or devisee; (2) where it is between him and the remainder-man or reversioner. As to disputes of the first kind, the right to fixtures (presuming the person to have died who annexed the chattels) shall be most strongly taken in favor of the heir or devisee (with house "incidents") as against the executor or administrator. 1 Schoul. Pers. Prop. § 119; *Colegrave v. Dias Santos*, 2 B. & C. 76; *Bishop v. Bishop*, 11 N. Y. 123, 62 Am. Dec. 68 (hop holes); 1 Ambl. 395; *Birch v. Dawson*, 2 Ad. & El. 37; *Fisher v. Dixon*, 13 Cl. & Fin. 312. And see *Wms. Exrs.* 732-739; 2 Freem. 249; 1 P. Wms. 94; *Blethen v. Towle*, 40 Me. 310; *Tuttle v. Robinson*, 33 N. H. 104. Cf. *House v. House*, 10 Paige, 157; *Lawrence v. Kemp*, 1 Duer, 363; *Johnson v. Wiseman*, 4 Met. 357; *Hays v. Doane*, 11 N. J. Eq. 84, 98. As to gas or water fixtures, cf. *Vaughen v. Haldeman*, 33 Penn. St. 522, 75 Am. Dec. 622; *Montague v. Dent*, 10 Rich. 135, 67 Am. Dec. 572. As between the executor of a life tenant and the remainder-man or reversioner, the common law appears to favor the soil rather less, and the representative desiring to take rather more; for here are not antagonizing claims of title, as between realty and personalty, but the landed interest of one under a will is compared with that of another, the court desiring to carry out the testator's intent. *Dudley v. Warde*, Ambl. 113; *D'Eyncourt v. Gregory*, L. R. 3 Eq. 382; *Norton v. Dashwood*, (1896) 2 Ch. 497. Pews in church are by the common law real estate, and the title goes accordingly; but in some States they are made personal property by statute. 1 Schoul. Pers. Prop. § 132; *McNabb v. Pond*, 4 Bradf. (N. Y.) 7.

<sup>2</sup> *Supra*, 175. The general rule is that simple contract debts are, for the purpose of founding administration, assets where the debtor resides without regard to the place where the voucher may be found. *Wyman v. Halstead*, 109 U. S. 654, 27 L. Ed. 1068. But the State or country which charters a corporation is its domicile in reference to

## CHAPTER II.

## INVENTORY OF THE ESTATE.

229. An inventory of the decedent's estate was formerly required in England; but the practice has fallen into disuse.<sup>1</sup>

230. The inventory is a feature of probate practice in the United States; and as our American probate theory, favoring public registry in such matters, is, that the legal representative<sup>2</sup> shall render accounts of his administration, his first duty, as relates to the court, is, after obtaining his credentials, to prepare and file an inventory of the assets of the deceased; such inventory to serve as the basis of his probate accounts.<sup>3</sup>

debts which it owes, because there only it can be reached for the service of judicial process; yet States or countries where a foreign corporation does business have enlarged the facilities of local administration in many respects by appropriate statute. *N. E. Mutual Life Ins. Co. v. Woodworth*, 111 U. S. 138, 144, 28 L. Ed. 374. Bills, notes, and incorporeal personalty on which money is payable, are suitable local assets to found local administration upon, where one dies domiciled elsewhere, if there be any way to realize upon them. *Epping v. Robinson*, 21 Fla. 36. Stock of a corporation in another State may be local assets. *Luce v. Manchester R.*, 63 N. H. 588, 3 A. 618.

The domiciliary representative usually gathers in all personal assets procurable (beyond local claims), whether within or without the jurisdiction, and is liable accordingly. 69 N. E. 1126, 177 N. Y. S. 584; *infra*, 175.

<sup>1</sup> *Wms. Exrs.* 529, 974-976. See 2 Ves. Sen. 193; 1 Phillim. 240. The bond given under the Court of Probate Act is conditioned to make an inventory when lawfully called on, and to exhibit the same whenever required by law to do so; in other words, unless the representative is cited by an interested party he incurs no official obligation in the matter. *Wms. Exrs.*, *ib.* See 1 Phillim. 240; 1 Hagg. 106.

<sup>2</sup> Unless a residuary legatee with peculiar bond to pay debts and legacies, running the risk of sufficient assets. 138, *supra*.

<sup>3</sup> The bonds of executors and administrators are accordingly conditioned, in all or most of the leading States, to return a sworn inventory to the probate court or registry within a specified period from the date of qualification. Part II, c. 5. See 4 Dem. 176. As to appraisers' fees, etc., cf. local code; 145 N. Y. 540, 40 N. E. 246. As to choice of appraisers, see 33 So. 946, 82 Miss. 93, 70 A. 229.

Three months or other statute period is prescribed within which an executor or administrator should return his inventory to the court or registry whence his appointment came. In some States only one inventory is required, and for additional property coming to his possession or knowledge, as well as income and accretions, the executor or administrator is bound only to account; but in others the local statute provides for filing a supplemental inventory in such a case. Cf. *Hooker v. Bancroft*, 4 Pick. 50; 4 Redf. (N. Y.) 489. See also *Moore v. Holmes*, 32 Conn. 553; *Commonwealth v. Bryan*, 8 S. & R. 128. See 100 Cal. 158, 34 P. 667 (a later period under a new warrant). But where no property has come to his hands, the representative may dispense with the formality and cost of an inventory, making, perhaps, a sworn declaration. *Walker v. Hall*, 1 Pick. 20; 2 Dak. 189. If a verified account is filed showing no assets, the burden is on those who assert otherwise to show assets. 2 Dem. 129. Cf. 3 Dem. 358; 4 Hagg. 242. So, too, it is held, where there were no assets left to exhibit to appraisers, but all the assets had been justly used in paying the funeral expenses and debts. *Creamer v. Waller*, 2 Dem. 263. See *Littlefield v. Eaton*, 74 Me. 516. As to filing a

231. Time alone constitutes no bar against the requirement of an inventory, where the statute fails explicitly to sanction the omission. But time, in connection with other circumstances, may operate to dispense with filing an inventory, as in raising a presumption.<sup>1</sup>

232. It is not in practice the original executor or administrator alone, or an administrator with the will annexed, who is bound to make and return an inventory.<sup>2</sup>

233. The inventory should contain a full description and valuation of all the personal property to which the executor or administrator became entitled by virtue of his office; this document being in effect a list of the assets for which he stands chargeable, taken at their just worth.<sup>3</sup> An inventory is, after all, but *prima facie*

second inventory to correct errors in the first, see 1 Browne 87; but correction seems usually well enough made on the administration accounts. See 77 N. Y. S. 266.

Whether a provision in a will can relieve of the duty of filing an inventory, see 2 Dem. 331; 3 Dem. 108. As to an executor who is life tenant, see Brooks v. Brooks, 12 S. C. 422.

The failure to return an inventory or the rendering of an inventory with omissions, does not necessarily render the executor or administrator personally liable; but the question is essentially one of culpable negligence or misconduct on his part, occasioning a loss. 2 Har. & J. 373; Moses v. Moses, 60 Ga. 9, 30; 1 Grant (Pa.), 366; 4 B. & Ad. 657. Nevertheless, the failure to file an inventory by the time specified, as American statutes run, amounts technically to a breach of the condition of the bond, which may or may not prove serious in its consequences. McKim v. Harwood, 129 Mass. 75; Adams v. Adams, 22 Vt. 50; Lewis v. Lusk, 35 Miss. 696, 72 Am. Dec. 153; 83 Wis. 394, 53 N. W. 691. See Scott v. Governor, 1 Mo. 686; 1 Fairf. 53; Bourne v. Stevenson, 58 Me. 599; 57 A. 279, 76 Conn. 555; 53 A. 79 (N. J. Eq.); Hart v. Ten Eyck, 2 Johns. Ch. 62. For breach of bond he is liable for such damages as may be equitably due to any one aggrieved. State v. French, 60 Conn. 478, 23 A. 153; 146. See local statutes. As in English practice, the application for a summons to file an inventory may be made by any one interested in the estate; e.g., an apparent creditor. 37 Barb. 540. And see 4 Dem. 275; 15 Phila. 588; 80 N. Y. S. 220; 111 S. W. 848, 132 Mo. App. 44; 109 N. W. 45, 132 Iowa, 136 (State treasurer to collect inheritance tax). The court may summon at its own instance, though this is seldom done. 1 Bradf. 24.

<sup>1</sup> Ritchie v. Rees, 1 Add. 144.

<sup>2</sup> See Wms. Exrs. 979; 1 Add. 144; 4 Hagg. 241; 2 Curt. 919. See further, *post*, as to dispensing with an account. Cf. local statute; Wms. Exrs. 979, 980; 1 Add. 158; 2 Add. 234; 2 Phillim. 364. In American practice, the bonds of all executors, administrators, probate guardians, and testamentary trustees, are usually conditioned to return an inventory; and without an inventory valuation as a basis they cannot readily prepare their accounts in due form.

<sup>3</sup> Wms. Exrs. 980. See preceding chapter as to personal assets. While in some parts of this country only personal property of the deceased should be inventoried, the legislatures of other States insist that his real estate shall also be appraised, two separate schedules being made, and the schedule of personal property alone serving as the basis of the executor's or administrator's accounts. See *supra*, 198. Cf. 1 Mass. 35. The latter practice appears the more convenient, as affording record proof of all the assets, actual or potential, upon which creditors and legatees may rely; and, under a will which confers the power to manage and control the testator's real estate, or where, as some local statutes provide, the representative has a general right of possession of the real estate while the estate is being settled, there are reasons especially urgent why real property should be scheduled.

evidence of the true value of assets, and prudence and good faith is the test of the representative's responsibility in dealing therewith; so that whether more happens to be actually realized, or less, or the title fails altogether, the exercise of reasonable diligence and honesty on his part is all that the law can exact from the executor or administrator.<sup>1</sup>

234. Local statutes prescribe in terms, more or less specific, what shall be included in the inventory.<sup>2</sup>

235. Any co-ownership should be severed, so that the inventory of a decedent may show his individual share.<sup>3</sup>

236. Such is the inconclusiveness of any inventory valuation in probate law that the court of probate is seldom asked to intervene

An inventory should be specific in its enumeration of the effects of the estate; not necessarily minute, of course, and yet so as to separate large items of value, and set out by themselves such special classes as chattels real, household furniture, cattle, stock in trade, cash, and securities of the incorporeal sort, such as notes and bonds. *Vanmeter v. Jones*, 3 N. J. Eq. 520. Property found among the effects of the deceased, and coming to the possession of the representative, if claimed by others under a title not yet established, might be included in the list, with suitable words or memorandum. *Waterhouse v. Bourke*, 14 La. Ann. 358; *Kirby (Conn.)* 100. Bonds and investment securities should be stated at their current market value, or, possibly, in some convenient instances at par; provided, in the latter instance, this be stated and that the representative carefully regard the fair premium in dealing and disposing of them, so that those interested shall have the benefit shared justly. Debts and incorporeal choses of a doubtful, desperate, or worthless character should be so denominated. Cf. 2 Dev. & B. Eq. 137, 155; *Hickman v. Kamp*, 3 Bush, 205; 48 La. 289. Real estate should be specified by parcels. See *Adams v. Adams*, 20 Vt. 50; *Wms. Exrs.* 981; 66 P. 607, 40 Or. 138 (judgment debt). What are not really assets for administration may be omitted. Cf. 238-245.

<sup>1</sup> Such being the result, all discrepancies may be corrected in a representative's accounts, and debit or credit given accordingly. 236, *post*. Hence, too, the valuation in the inventory by one standard or another appears to be of less consequence than a consistent valuation by the particular standard as therein plainly exhibited; for values, and especially those of various marketable stocks and securities, may fluctuate from day to day, so as to furnish no absolute criterion of accountability. At best the inventory figures represent only approximately the gross available assets in many instances, and must be supplemented by the administration accounts, as to accruing income, profits, losses, etc. See *Willoughby v. McClure*, 2 Wend. 609; *Weed v. Lermont*, 33 Me. 492.

<sup>2</sup> As to general property of the deceased, the rule embraces all that has come to the "possession or knowledge" of the executor or administrator; and to this his oath of verification usually corresponds in tenor. Hence notes or chattels of any kind left in the hands of other persons, and belonging of right to the executor or administrator, must be inventoried. As to assets abroad and out of the domestic jurisdiction, see *Wms. Exrs.* 979, 980; local statute. Cf. 2 Cas. temp. Lee, 551; *Wms. Exrs.* 982; local statute; *Butler's Inventory*, 38 N. Y. 397; 28 N. Y. Supr. 59. Practically, the means of appraising what is abroad are imperfect. Any such requirement does not apply to an ancillary appointee with strictness, probably, inasmuch as his authority is local.

Assets of whose existence neither the executor or administrator, nor the appraisers, are at the time aware, cannot of course be inventoried. As to the duty of the representative to inventory property which has been fraudulently transferred by the decedent, cf. *Booth v. Patrick*, 8 Conn. 105, with 3 Conn. 289; *Bourne v. Stevenson*, 58 Me. 504; *Andrews v. Tucker*, 7 Pick. 250. And see 17 R. I. 751.

<sup>3</sup> *Colvert v. Peebles*, 71 N. C. 274.

in valuation; and the extent, moreover, of such a jurisdiction, apart from the statute sanction, may be a matter of serious question.<sup>1</sup> An inventory duly returned to the probate court or registry, is, according to modern authorities, *prima facie* proof, and no more, of the amount of property (personal, or personal and real, as the case may be) belonging to the estate within the State or country where jurisdiction was taken; and also of its worth by items at the time of appraisal.<sup>2</sup>

237. **The inventory is of advantage, both to the executor or administrator himself, and to creditors, legatees, heirs, and other persons interested in the estate.**<sup>3</sup>

<sup>1</sup> Cf. *Applegate v. Cameron*, 2 Bradf. 119; 8 Mod. 168; *Catchside v. Ovington*, 3 Burr, 1922; 2 Add. 331; *Wms. Exrs.* 985. As to disagreement of appraisers, see *Bourne v. Stevenson*, 58 Me. 499. An inventory not certified by the executor or administrator is not as to him an inventory. *Parks v. Rucker*, 5 Leigh, 149. But see *Carroll v. Connet*, 2 J. J. Marsh. 195; 100 Cal. 593, 35 P. 341. Local practice may determine such a point. See *Martin v. Boler*, 13 La. Ann. 369; 1 Dem. 306. Legatees or next of kin may not interfere with an appraisal; they must wait for the accounting. 4 Dem. 399. See *Gold's Appeal*, Kirby (Conn.) 100. Even granting that an inventory cannot be rejected or impeached, this only affects proceedings relating to the inventory itself; and it may be shown on the accounting of the executor or administrator that assets were omitted which were or ought to have been accounted for, and that assets yielded, or should have yielded, more than they were appraised at; so, *vice versa*, on the accounting, the inventory may be shown to have included what should have been omitted or to have rated specified things for more than they could fairly bring. Part VII, *post*, as to accounts; 2 Bradf. Surr. 220; *Murphy's Estate*, 70 P. 107, 30 Wash. 1.

<sup>2</sup> *Wms. Exrs.* 1966; 1 Stark. N. P. 32; *Reed v. Gilbert*, 32 Me. 519; *Morrill v. Foster*, 33 N. H. 379. A mere onus of disproof rests on the representative. *Hoover v. Miller*, 6 Jones L. 79; *Cameron v. Cameron*, 15 Wis. 1, 82 Am. Dec. 652; *Ames v. Downing*, 1 Bradf. 321; *Cronshaw v. Cronshaw*, 41 A. 563, 21 R. I. 54; 79 P. 841, 146 Cal. 139; *Porter v. Long*, 83 N. W. 601, 124 Mich. 584. Subsequent changes of value, or subsequent additions to the assets, or gains or losses in realizing the assets, are not to be disregarded, whatever the inventory itself may have shown. *Willoughby v. McCluer*, 2 Wend. 608. The failure to inventory certain property is not conclusive against those interested in the estate. *Walker v. Walker*, 25 Ga. 76; *McWillie v. Van Vacter*, 35 Miss. 428, 72 Am. Dec. 127. Nor does it estop the representative from recovering it. *Conover v. Conover*, 1 N. J. Ed. 403. See also *Conser's Estate*, 66 P. 607, 40 Or. 138; *Holt v. Holt*, 35 S. E. 19, 46 W. Va. 397. In short, the inventory, while *prima facie* evidence of the value of the property, as well as of the property itself, which came to the executor or administrator, as also of the solvency of those who owe the estate, is not conclusive either for or against the executor or administrator or his sureties, but is open to denial or explanation, and one must render account for all assets. *Nabb v. Nixon*, 7 Nev. 163; *Grant v. Reese*, 94 N. C. 720; 66 Wis. 490, 29 N. W. 213. As to the executor's or administrator's own debt (which should be inventoried), see *supra*, 208. And see *Seller's Estate*, 82 Penn. St. 153.

<sup>3</sup> It is the basis upon which the representative makes his accounts; it shows the amount for which he is chargeable, and limits presumptively his responsibility, except for increments, income, and such assets not therein appraised, through ignorance, inadvertence, or other cause, as may come afterwards to his hands. On the other hand, the heirs and other parties interested have, in the recorded inventory, the best evidence possible under the circumstances of the assets, their condition and value, as they came to the representative's possession and knowledge at the outset of his administration, and are supplied with essential evidence, in case it becomes necessary to institute proceedings against him or oppose the allowance of his accounts, because of negligence or misconduct while invested with his responsible office. See *Sanderson, Re*, 74 Cal. 199, 15 P. 753.

## PART IV.

GENERAL POWERS, DUTIES AND LIABILITIES OF  
EXECUTORS AND ADMINISTRATORS  
AS TO PERSONAL ASSETS.

## CHAPTER I.

## REPRESENTATIVE'S TITLE AND AUTHORITY IN GENERAL.

238. In modern practice, acts performed before qualification in good faith, and for the benefit of the estate, are generally cured by qualification, whether the representative be executor or administrator; and his authority once fully conferred by the probate court, the representative's title as to personal property or assets relates back substantially to the date of the decedent's death.<sup>1</sup>

239. The title of the executor or administrator, as representative, extends so completely to all personal property left by the decedent during administration as to exclude creditors, legatees, and all others interested in the estate. They cannot follow such property specifically into the hands of others, much less dispose of it; but the executor or administrator is the only true representative thereof for all concerned that the law will regard.<sup>2</sup>

<sup>1</sup> *Supra*, 194, 195, 198. Where one discharges a mortgage before his appointment as executor or administrator, the discharge becomes valid by his appointment. 30 Hun (N. Y.) 269. And so with a fair sale or transfer of property. 50 N. Y. Supr. 225. As to bringing an action, see *Archdeacon v. Gas Co.*, 81 N. E. 152, 76 Ohio St. 97. And see *Wiswell v. Wiswell*, 35 Minn. 371, 29 N. W. 166; *McDearmon v. Maxfield*, 38 Ark. 631. But the representative should not disturb acts beneficially done by others before his appointment, merely for the sake of asserting his authority. *Cooper v. Hayward*, 71 Minn. 374, 70 Am. St. Rep. 330, 74 N. W. 152. He may be bound by his previous promises, etc. 76 P. 747, 27 Nev. 421, 103 Am. St. Rep. 772, 65 L. R. A. 672.

As with the title, so is the liability of the representative; and he must account for assets previously received or under his control in any way; pursuing with due prudence and good faith where others have such assets, while as to real property he gains usually no title save where the personal assets prove deficient. See *Myers, Re*, 131 N. Y. 409, 30 N. E. 135; 269-271.

<sup>2</sup> *Wms. Exrs.* 932; 11 Hare, 93; *Nugent v. Giffard*, 1 Atk. 463; *Beattie v. Abercrombie*, 18 Ala. 9; 3 Mass. 514, 3 Am. Dec. 173; *Beecher v. Buckingham*, 18 Conn. 110; *Neale v. Hagthorpe*, 3 Bland (Md.) 551; 1 Woods, 487. To this rule statute exceptions are found in some parts of the United States. Thus, under the California system (as in Texas), real and personal estate follows one rule; it vests in the heir subject to the representative's lien, etc. *Becket v. Selover*, 7 Cal. 215, 68 Am. Dec. 237. See further, *Palmer v. Palmer*, 55 Mich. 293, 21 N. W. 352.



240. **It follows that the executor or administrator, and he alone, has absolute dominion,** in law and equity, over the goods, chattels, rights, and effects of the deceased; he can dispose of such personalty at pleasure, being, however, responsible for the faithful execution of his trust; and others in interest cannot follow such property into the hands of the alienee.<sup>1</sup>

241. **But here we must distinguish between executors and administrators.** An administrator's office is conferred by the court appointment, and his authority is derived from statute and the general probate law, not from any confidence reposed in him by the deceased; his powers and duties consequently are commensurate with others of his class, and are defined by general rules.<sup>2</sup> But it is quite different with the executor; for his authority, being conferred by a will duly admitted to probate, is subject in a great measure to the powers and restrictions which the testator may therein have prescribed.<sup>3</sup>

242. **The title of the representative, however, is not absolute, but is by way of trust,** and exists only for special purposes connected with the settlement of the estate.<sup>4</sup>

243. **So long as the property of the estate is kept distinguishable specifically from the mass of his own,** the executor or administrator

This paramount title of the personal representative is recognized in various instances. As where a principal dies in possession of the goods, and they come afterward to the possession of his administrator. *Swilley v. Lyon*, 18 Ala. 552 (advances by factor). And so completely does title to the personal assets vest in the representative, that they are not subject to seizure and sale under an execution issued on a judgment rendered against the decedent after his death. *Snodgrass v. Cabiness*, 15 Ala. 160. See as to counsel under the will, *Young v. Alexander*, 16 Lea, 108.

<sup>1</sup> *Beecher v. Buckingham*, 18 Conn. 110, 44 Am. Dec. 580; *Neale v. Hagthorpe*, 3 Bland (Md.) 551; *Lappin v. Mumford*, 14 Kan. 9. See cs. 3, 4, more fully as to sales, pledges, etc., of personal property by the representative. Only statute or the will of the decedent can here control him.

<sup>2</sup> Local statutes tend to enlarge rather than restrain the exercise of such powers. See Mass. 314.

<sup>3</sup> Save in accordance with the fundamental maxim, that the necessity of settling lawful debts and charges against one's estate must override all testamentary dispositions. In Louisiana the law is of civil origin and peculiar. *Ferguson v. Glaze*, 12 La. Ann. 667. See *Voorhees v. Stoothoff*, 11 N. J. L. 145; *Stallsworth v. Stallsworth*, 5 Ala. 144; *Wood v. Nelson*, 9 B. Mon. 600.

<sup>4</sup> *Hall v. Hall*, 27 Miss. 458; *Lewis v. Lyons*, 13 Ill. 117; *Ashhurst, J.*, in 4 T. R. 645. For trust term, see *Smith v. Dunwoody*, 19 Ga. 238. As with his title, so in its ultimate consequences with his power of disposition, one deals with the property in the interests of the estate he represents. His cardinal duty is to settle the estate according to law, or the last will of the deceased, as the case may be, with due diligence, fidelity, and a reasonable discretion. The precise legal standard of responsibility is considered in c. 3, *post*. In fact, the interest which an executor or administrator has in the property of the deceased is very different from the interest one has in his own property. 9 Co. 88 b; 2 Inst. 236; *Wms. Exrs.* 636. And see *Morrison's Estate*, 67 N. E. 567, 68 Ohio St. 252 (jurisdiction over him).

will not by his bankruptcy or insolvency pass the title to his assignees.<sup>1</sup> Nor can goods and chattels which may be identified as belonging to the decedent's estate be taken in execution for the debt of the executor or administrator.<sup>2</sup> But if the representative mingle the goods, rights, and effects of the intestate with his own, in such a manner that they cannot be distinguished, the effect must necessarily be to subject the whole to a devolution of title in favor of his assignee in bankruptcy, execution creditor, or personal representative, as the case may be.<sup>3</sup>

244. **The representative takes no available title to personal chattels of which the deceased held possession in another's right, and kept so that their identity may be traced.**<sup>4</sup> If, therefore, the representative takes possession of personal property which was in possession of his decedent at the time of his decease, but to which another claims title, his exercise of dominion is at his own peril.<sup>5</sup> But the mere possession of property by a decedent at the time of his death gives to his legal representative the right to its possession, as against third parties having no better right.

245. **Nor, again, does the representative succeed, by virtue of his office, to any trust exercised by the decedent during his life; but his duty is to render a final account closing up the trust, as respects**

<sup>1</sup> Wms. Exrs. 637, 638; 11 Mod. 138; *Farr v. Newman*, 4 T. R. 648. See 154, *supra*; *Doe v. David*, 1 Cr. M. & R. 405 (lease provision).

<sup>2</sup> *Farr v. Newman*, 4 T. R. 621; Wms. Exrs. 640. They do not pass to representative's own representative on his death. 2 Plowd. 644; Wms. Exrs. 644. See further, 2 Ld. Raym. 1307; Co. Lit. 351 a; Schoul. Dom. Rel., § 86 (marriage of representative affects no transfer).

<sup>3</sup> There is quite commonly a partial mingling of the trust funds with one's own in the course of administration. See Wms. Exrs. 646; *Livingston v. Newkirk*, 3 John. Ch. 312, 318, *per* Chancellor Kent. Where trust and individual funds are mingled, the estate becomes a creditor with other creditors for its just balance; though to place the estate essentially in this precarious attitude or to speculate with such funds is a breach of official duty. See c. 3, *post*, as to management, etc.

<sup>4</sup> Thus, the bare fact that one died in possession of property, as administrator on another's estate, will not enable his personal representative to maintain trover, where the right to the goods in question has devolved upon the administrator *de bonis non* of the original intestate owner. *Elliott v. Kemp*, 7 M. & W. 306. No third person coming into possession of a thing bailed among the dead man's effects can resist the bailor's demand by setting up the title of the deceased bailee's personal representatives. *Smiley v. Allen*, 13 Allen, 365. Nothing but the bailee's possible lien for reimbursement, or *jus tertii* can obstruct the recovery of the property in such cases. Schoul. Bailm. § 61.

<sup>5</sup> See *Yeldell v. Shinholster*, 15 Ga. 189; *Newsum v. Newsum*, 1 Leigh, 86, 19 Am. Dec. 739. Cf. *Mulford v. Mulford*, 40 N. J. Eq. 163 (protection). And see *Rowley v. Fair*, 104 Ind. 189, 3 N. E. 860; *Bloxham v. Crane*, 19 Fla. 163; 174 Ill. 96, 50 N. E. 1052.

<sup>6</sup> *Cullen v. O'Hara*, 4 Mich. 132. So as to corporate property, where corporate officer dies. *Belton, Re*, 47 La. Ann. 1614. As to partnership property, see 325, 326, 379. As to lands, see *Sullivan v. Lattimer*, 35 S. C. 422; 212-215; 509-517.

the deceased, to see that the estate of the deceased is properly reimbursed for all charges and expenditures properly incurred, and relieved of all further responsibility. Should there remain any surplus or further duties to be discharged under the trust, he should transfer the fund to the proper successor in the trust, and leave him to perform all further functions relative thereto.<sup>1</sup>

246. **To determine when one ceases to hold property belonging to the estate, as a fiduciary,** and holds it in his individual or other inconsistent character, all the circumstances of the case must be regarded.<sup>2</sup>

247. **Guardianship is a separate trust and should not be blended with that of administration.**<sup>3</sup> Nor is it within the line of the ordinary duty and authority of an executor or administrator to control property of widow and children, or to apply ordinary assets in his hands for maintenance and education.<sup>4</sup>

248. **So with an executor who has likewise been named trustee** under the will; though here, perhaps, the regular qualification with procurement of letters which fixes the character of the latter fiduciary is more likely to be postponed to the final accounting and settlement of the estate than in the case of a guardianship. One should not be made liable as trustee for funds which came to his hands as executor; but after the lapse of a considerable period the

<sup>1</sup> See *Little v. Walton*, 13 Penn. St. 164; 5 Dem. 305 (code); 1 Hoffm. 150; *Sullivan v. Lattimer*, 35 S. C. 422, 14 S. E. 933.

<sup>2</sup> *Wms. Exrs.* 641-643; *Gamble v. Gamble*, 11 Ala. 966, 975; *Weeks v. Gibbs*, 9 Mass. 76. As to election or change, see *McClane v. Spence*, 11 Ala. 172; 6 Ala. 894.

<sup>3</sup> See *Menifee v. Ball*, 7 Ark. 520; *Stallsworth v. Stallsworth*, 5 Ala. 144; *Schoul. Dom. Rel.* § 324.

<sup>4</sup> *Wright v. Wright*, 64 Ala. 88; 63 Ala. 293; *Kent v. Stiles*, 2 N. J. L. 368. See 447, as to allowances to widow, children, etc.; 3 E. D. Smith (N. Y.) 561.

The same person may be constituted executor under the parent's will, or administrator, and also guardian of the minor children; hence the question, whether he holds a fund in one or the other capacity. *Wren v. Gayden*, 1 How. (Miss.) 365; *Johnson v. Fuquay*, 1 Dana, 514. See *Percival v. Gale*, 40 N. J. Eq. 440. To perform here the functions of administration is first in order, and some distinct act of transfer is preliminary to fixing the liability of guardian. *Alston v. Munford*, 1 Brock, 266; *Burton v. Tunnell*, 4 Harring. 424; *Stillman v. Young*, 16 Ill. 318; *Scott's Case*, 36 Vt. 297. But see *Conkey v. Dickinson*, 13 Met. 51. And see further, *Watkins v. State*, 4 Gill & J. 220; 6 Dana, 3; *Crosby v. Crosby*, 1 S. C. N. S. 337; *Wilson v. Wilson*, 17 Ohio St. 150, 91 Am. Dec. 125; *Townsend v. Tallant*, 33 Cal. 45, 91 Am. Dec. 617; *Wood, R.*, 71 Mo. 623; *Weaver v. Thornton*, 63 Ga. 655; *Carrol v. Bosley*, 6 Yerg. 220, 27 Am. Dec. 460; *Coleman v. Smith*, 14 S. C. 511. And see *Schoul. Dom. Rel.* § 324. On legal principle, one ought not to be sued both as executor or administrator and as guardian, nor should both sets of sureties be held responsible for the fund; but in doubtful cases of this kind, where the principal's delinquency has occasioned the doubt, the modern inclination is to let the ward sue both sets of sureties, leaving them to adjust their equities among themselves. *Harris v. Harrison*, 78 N. C. 202 *Perry v. Carmichael*, 95 Ill. 519; *Merket v. Smith*, 33 Kan. 66, 5 P. 394.

presumption may fairly be that the estate has been fully administered by the executor, and accordingly that the funds are held by him in the new character.<sup>1</sup>

249. Devolution of title where the representative is also a legatee or distributee is sometimes considered.<sup>2</sup>

250. Upon estate undeviseed or undisposed of under the will, the executor rightfully administers where there is a partial intestacy, as well as executing the will itself; and this he may do *ex officio* without procuring letters of administration for that purpose.<sup>3</sup>

251. To the personal representative belongs the control of the legal assets; also the right, together with the duty, of collecting all claims and discharging all liabilities of the decedent.<sup>4</sup> The representative takes the place of the decedent as to all contracts on which the latter was bound at his death, and is expected to discharge them in the manner provided by law, or according to the means in his hands for properly liquidating all of the decedent's obligations.<sup>5</sup> He must appropriate the assets honestly and dis-

<sup>1</sup> *Jennings v. Davis*, 5 Dana, 127. But something should be done whereby the executor's status is changed, so that he becomes a trustee. *Hood, Re*, 104 N. Y. 103, 10 N. E. 35; *Crocker v. Dillon*, 133 Mass. 91; 10 Cush. 1; 161 Mass. 188, 36 N. E. 795. Scope of will may be considered. *Ward v. Ward*, 105 N. Y. 68, 11 N. E. 373; *Scott v. West*, 63 Wis. 529, 25 N. W. 18.

Where the trust is simple and no trustee is named in the will the executor is sometimes allowed to hold the fund, and administer without any other express appointment. *White v. Massachusetts Institute*, 171 Mass. 84, 50 N. E. 512; 17 Pick. 182, 183, 28 Am. Dec. 288; *Marjarum v. Orange Co.*, 37 Fla. 165, 19 So. 637; *Groton v. Ruggles*, 17 Me. 137. But no executor is justified in retaining assets in his own hands regardless of a proper trustee. See 189 Penn. St. 150, 42 A. 5.

<sup>2</sup> Assent shown. See *Elliott v. Kemp*, 7 M. & W. 313; legacies, *post*; *Wms. Exrs.* 649. An executor who is residuary devisee and legatee, and gives bond for the payment of debts and legacies, becomes absolute owner of the real and personal estate, subject to that fiduciary obligation, and may sell or otherwise dispose of it so as to give a corresponding title. *Clarke v. Tufts*, 5 Pick. 337. As to pleading limitations in bar of claims upon the estate, see *Smith v. Pattie*, 81 Va. 654.

<sup>3</sup> *Hays v. Jackson*, 6 Mass. 149; 152 Mass. 24; *Wilson v. Wilson*, 3 Binn. 557; *Landers v. Stone*, 45 Ind. 404; *Parris v. Cobb*, 5 Rich. Eq. 450; *Venable v. Mitchell*, 29 Ga. 566; *Dean v. Biggers*, 27 Ga. 73. Whether this rule applies to an administrator with the will annexed, see 407, *post*. The local statute is sometimes explicit on such points. See as to the effect of appointing an administrator in such cases, *Patton's Appeal*, 31 Penn. St. 465.

<sup>4</sup> He has much discretion as to modifying contracts and compromising claims. *Gray v. Hawkins*, 8 Ohio St. 449, 72 Am. Dec. 600; 20 Penn. St. 210; *Laughlin v. Lorenz*, 48 Penn. St. 275, 86 Am. Dec. 592; *Davis v. Lane*, 11 N. H. 512; *Meeker v. Vanderveer*, 15 N. J. L. 392; 38 So. 916, 143 Ala. 234; 66 P. 979, 135 Cal. 36 (statute); 63 A. 159, 78 Vt. 399 (statute).

<sup>5</sup> *Woods v. Ridley*, 27 Miss. 119. Yet the executor or administrator has no inherent power to bind the estate or those interested in it, by partial or unjust acts or preferences. *Collamore v. Wilder*, 19 Kan. 16; *Gayle's Succession*, 27 La. Ann. 547; *Gouldsmith v. Coleman*, 57 Ga. 425; 15 Kan. 88.

creetly to the purposes and in the manner prescribed by law for the administration, settlement, and distribution of estates of the dead.

252. **The representative may avoid or dispute a contract, made by his testate or intestate**, as having been illegal, corrupt, and contrary to good morals or public policy, or as entered into when the decedent was of unsound mind.<sup>1</sup> In general he may set up such pleas in defence as were open to his decedent; and out of regard to the interests he represents, he may even take advantages and set up certain defences from which the decedent by his own acts might have been precluded.<sup>2</sup> Where, however, an executor or administrator who might disavow his intestate's act on good ground, ratifies and receives the benefit of it, he cannot afterwards disavow it.<sup>3</sup>

253. **All contracts of the decedent, however, are to be construed with reference to their subject-matter**; and hence, a contract to perform certain duties growing out of an existing personal relation, or requiring the exercise of a personal skill and taste, ceases to be binding when death terminates that relation, and the representative cannot be compelled to continue the performance.<sup>4</sup> But otherwise the death of one contracting party does not necessarily terminate the contract, and his estate may be held liable in damages for any breach committed after as well as before his death.<sup>5</sup> And if a contract with a deceased party is of an executory nature, and his personal representative can fairly and sufficiently execute all that the deceased could have done, he may do so, and complete the contract for the benefit of the estate.<sup>6</sup>

254. **At common law, if an executor or administrator undertakes to perform the contract of the decedent**, it is upon his own personal responsibility, so that if losses are sustained he must bear them,

<sup>1</sup> *Eubanks v. Dobbs*, 4 Ark. 173; 44 N. Y. Super. 26.

<sup>2</sup> See 220 as to recovering property fraudulently transferred by the decedent, in the interest of creditors of the estate. As to a transfer upon usury, see 98 Ga. 139, 26 S. E. 487.

<sup>3</sup> 36 Hun, 513. See *Pringle v. McPherson*, 2 Desau. 524.

<sup>4</sup> *Bland v. Umstead*, 23 Penn. St. 316; *Siboni v. Kirkman*, 1 M. & W. 418; Wms. Exrs. 1725; *Smith v. Wilmington Coal Co.*, 83 Ill. 498; *McGill v. McGill*, 2 Met. (Ky.) 258. And see c. 5, *post*, as to the responsibility of an executor or administrator.

<sup>5</sup> *Smith v. Wilmington Coal Co.*, 83 Ill. 498. See 40 Mich. 226.

<sup>6</sup> *Ib*; c. 5, *post*; 1 Cr. & Jerv. 405; *Garrett v. Noble*, 6 Sim. 504; Wms. Exrs. 1794. How all this shall be done becomes a matter for the exercise of fidelity and due business discretion on the representative's part, aided, if need be, by the advice or authority of the court or of those interested in the estate and its surplus.

while if profits are realized they become assets in his hands for the benefit of the estate.<sup>1</sup>

255. **The executor's or administrator's promise to pay a debt or to answer for damages** of his decedent will not, it is held, render him personally liable unless there was a sufficient consideration to support the promise.<sup>2</sup> A bare verbal promise, therefore, of the representative in such cases may be void as without consideration, or void under the Statute of Frauds as a collateral promise not reduced to writing.<sup>3</sup>

256. **Ordinarily, engagements contracted by the personal representative are obligatory only upon himself**, and cannot, primarily, bind the estate committed to him or charge specifically the *corpus* of the assets; these assets being primarily bound rather for the debts which the deceased himself contracted during his lifetime.<sup>4</sup>

<sup>1</sup> *Smith v. Wilmington Coal Co.*, 83 Ill. 498; *Mowry v. Adams*, 14 Mass. 327. Equity and modern probate courts regard the question of honesty and due discretion on his part, in passing upon the representative's accounts afterwards. But this is only so far as relates to charging him with reference to the assets in his hands; and his personal liability may transcend the limit of the means at his command where he contracts without a careful reservation in that respect. *Wms. Exrs.* 1776; *Davis v. French*, 20 Me. 21, 37 Am. Dec. 36; *Ellis v. Merriman*, 5 B. Mon. 296.

<sup>2</sup> *Wms. Exrs.* 1776; *Ambl.* 330; 1 *Ves. Sen.* 126; *Nelson v. Serle*, 4 M. & W. 795. But cf. *Templeton v. Bascom*, 33 Vt. 132 (promise by sole distributee).

<sup>3</sup> *Sidle v. Anderson*, 45 Penn. St. 464; *Wms. Exrs.* 1776, 1784; 29 Car. II, c. 3; *Walker v. Patterson*, 36 Me. 273; *Winthrop v. Jarvis*, 8 La. Ann. 434; *Hester v. Wesson*, 6 Ala. 415.

A sufficient consideration for such promise arises where the creditor forbears to sue. 2 *Lev.* 122; *Bradley v. Heath*, 3 Sim. 543; *Mosely v. Taylor*, 4 Dana, 542; *Templeton v. Bascom*, 33 Vt. 132. *Aliter* where there could plainly be no suit brought, so that the forbearance was worthless. *McElwee v. Story*, 1 Rich. 9. So, too, having assets is a good consideration, according to various modern authorities. *Wms. Exrs.* 1783; *Cowp.* 284, 289; 1 *Ves. Sen.* 126; 2 *Murph.* 332; *Thompson v. Maugh*, 3 Iowa, 342.

<sup>4</sup> *Ferry v. Laible*, 27 N. J. Eq. 146; *Clopton v. Gholson*, 53 Miss. 466; *McFarlin v. Stinson*, 56 Ga. 396; 79 N. W. 390, 108 Iowa, 611; *Taylor v. Mygatt*, 26 Conn. 184; *Austin v. Munro*, 47 N. Y. 360; 42 S. E. 1035, 116 Ga. 663; *Moody v. Shaw*, 85 Ind. 88; 119 Cal. 492, 51 P. 695. The executor or administrator may contract, doubtless, on principle, for all necessary matters relating to the estate which he represents; but the immediate and practical result is that, a sufficiency of assets being presumed as an element in the undertaking, he contracts as upon his personal responsibility to keep good that sufficiency. And, notwithstanding the intent is to benefit the estate, every contract made upon a new and independent consideration, moving between the promisee and personal representative, is the personal contract of the latter, binding himself and not the estate represented. This doctrine applies to the debt incurred by the representative in employing counsel to advise and assist him in the discharge of his duty. *Devane v. Royal*, 7 Jones (N. C.) L. 426; 544, *post*; *McGloin v. Vanderlip*, 27 Tex. 366; *Briggs v. Breen*, 123 Cal. 657, 56 P. 663, 886; 61 A. 556, 78 Vt. 28; *Thomas v. Moore*, 52 Ohio St. 200, 39 N. E. 803. Or where he purchases goods for the benefit of the estate. 3 *Port.* 221; *Lovell v. Field*, 5 Vt. 218. Or where he borrows money to pay the debts of the estate. 119 Cal. 492, 51 P. 695. Or where he contracts for a headstone or a monument. 167 Mass. 577, 46 N. E. 119. An executor or administrator has no power to bargain with an attorney to give him a legal interest in the estate as compensation for his services so as thereby to bind the estate. 48 Tex. 491;

Nor again, is the estate to be held liable for a tort committed by the executor or administrator; and whether suit is brought as for a conversion or in damages as for breach of contract, the estate cannot be made to respond.<sup>1</sup>

257. **The executor or administrator, like other fiduciaries, appears to have a charge or lien in his favor** for proper expenses and charges fairly and reasonably incurred in the prosecution of his trust; but such privilege does not extend to others employed by him or to whom he, as executor or administrator, has incurred an individual liability to pay.<sup>2</sup> This rule, though sometimes working harshly, is founded in sound policy, and better ensures a proper appropriation of the estate which the decedent left behind him.<sup>3</sup>

258. **Within the principles we have discussed, it may be asserted that, while a bond or covenant given by the representative as such, whereby he undertakes to assume whatever may be his decedent's debts, binds him as an "agent," so called, who has no principal, a bond given by him which is expressed to pay out of the assets**

57 Cal. 238; 257, *post*. His own allowance from the court, legacy, share, or claim is all that he can thus dispose of under any circumstances. But as to compensation, etc., allowable out of the estate, see *post*, Part VII, c. 2.

That an executor cannot create a lien on the assets for a debt due during the decedent's lifetime, see *Ford v. Russell*, 1 Freem. Ch. 42; *Ga. Dec. Part II*, 7; *James's Appeal*, 89 Penn. St. 54.

<sup>1</sup> *Sterrett v. Barker*, 119 Cal. 492, 51 P. 695; *Andrews v. Platt*, 58 A. 458, 77 Conn. 63; 81 N. Y. S. 315. On contracts made for necessary matters relating to the estate, the representative is personally liable, and must see to it that he is reimbursed out of the assets. *Pinkney v. Singleton*, 2 Hill, 343; *Miller v. Williamson*, 5 Md. 219; *Sims v. Stilwell*, 4 Miss. 176; *Jones v. Jenkins*, 2 McCord, 494; 2 Port. 33, 27 Am. Dec. 643; *Underwood v. Millegan*, 8 Ark. 254. The mere addition of the word "executor" or "administrator" in such a contract is insufficient to relieve the representative of this personal liability. *Hopkins v. Morgan*, 7 T. B. Mon. 1; *Beaty v. Gingles*, 8 Jones L. 302; *Litchfield v. Flint*, 104 N. Y. 543, 11 N. E. 58. For if it be understood that the other party must rely upon the assets and not the representative, and must take the risk of their adequacy upon himself, the mutual expression should be clearly to that effect; and even thus no lien would arise on the creditor's behalf, but the covenant or engagement of the executor or administrator, limited to the extent of assets in his hands, would bind him personally to that extent. *Nicholas v. Jones*, 3 A. K. Marsh. 385; *Allen v. Graffins*, 8 Watts, 397. And see *Ten Eyck v. Vanderpool*, 8 Johns. 120; 37 Miss. 526; 74 Ga. 486 (statute).

<sup>2</sup> *Wms. Exrs.* 1792; 11 Beav. 273; *Corner v. Shew*, 3 M. & W. 350; *Fitzhugh v. Fitzhugh*, 11 Gratt. 300, 62 Am. Dec. 653; *Montgomery v. Armstrong*, 5 J. J. Marsh. 175; *Steele v. Steele*, 64 Ala. 438, 38 Am. Rep. 15; *Woods v. Ridley*, 27 Dec. 119, 149; *Harrell v. Witherspoon*, 3 McCord, 486; *Austin v. Munro*, 47 N. Y. 360.

<sup>3</sup> Even though the representative contracted honestly as such, the estate is not bound by what he was not lawfully authorized to stipulate, but he alone is bound, however he may have described himself. *Brown v. Farnham*, 55 Minn. 27, 56 N. W. 352. But the estate of the deceased ought to be made responsible for promises and engagements made by the representative, which he had the legal right to make, or where in law it was his duty without a promise to do just what he had promised to do. *Brown v. Evans*, 15 Kan. 88. Claims are settled after probate rules established for general convenience, to be noted hereafter; and according as the contract arose with the deceased or with the representative himself. See c. 5, *post*, as to remedies, etc.

the balance due in settlement, or so as not to hold him personally, will not bind him beyond the assets received.<sup>1</sup> And the principle holds good generally that parties who contract may provide expressly in their written agreement that an implication which the law would otherwise raise shall not apply.<sup>2</sup>

259. **The individual obligation which the representative necessarily incurs by assuming to fulfil**, even in the name of his office, engagements of the decedent, serves as a caution against his assuming too much, or undertaking more on behalf of the estate he represents than the assets at his command fairly warrant. When, however, an executor or administrator out of his private funds pays a debt or discharges a contract which constitutes in reality a just charge against the estate of the testator or intestate, he will be entitled to an allowance for the same in his accounts; and administration under probate and equity direction supplies a sort of lien upon the assets for his reimbursement.<sup>3</sup> This lien upon the assets, however, if such we may term it, does not secure the representative for liabilities or expenses incurred outside the proper scope of his official duty.<sup>4</sup>

260. **Wherever advances by the representative have been made in good faith, and for the benefit of the estate**, they in some form become a charge upon the estate in the hands of any successor in the trust, whose duty it is to pay them as much as if they had occurred in the course of his own administration.<sup>5</sup>

<sup>1</sup> *Allen v. Graffins*, 8 Watts, 397. And see 58 Ind. 58. See as to note given by him, *Peter v. Beverly*, 10 Pet. 532, 9 L. Ed. 522; 1 How. 134, 11 L. Ed. 75; 122 N. C. 318, 30 S. E. 331 (extension, etc.); *Douglas v. Fraser*, 2 McCord Ch. 105; *Maraman v. Trunnell*, 3 Met. (Ky.) 146, 77 Am. Dec. 167; *Dunne v. Deery*, 40 Iowa, 251. See also, as to notes, *Thompson v. Maugh*, 3 Iowa, 342; 2 Br. & B. 460; 1 Cr. & J. 231; 1 T. R. 489; *Snead v. Coleman*, 7 Gratt. 300, 56 Am. Dec. 112; *Studebaker M. Co. v. Montgomery*, 74 Mo. 101; *McGrath v. Barnes*, 13 S. C. 328, 36 Am. Rep. 687; *Saffold v. Banks*, 69 Ga. 289; *Patterson v. Craig*, 57 Tenn. 291; *Christian v. Morris*, 50 Ala. 585; *Cornthwaite v. Nat. Bank*, 57 Ind. 268; 122 N. C. 318; 62 Minn. 459, 54 Am. St. Rep. 653.

<sup>2</sup> *Banking Co. v. Morehead*, 20 S. E. 526, 115 N. C. 413; 52 N. E. 1067, 172 Mass. 153. On the other hand, the recognition by the executor or administrator of a claim against the estate, arising subsequent to the decedent's death and upon his own contract, will give it no additional validity; for it is not the estate that shall answer directly for it to the creditor, but the representative himself. *May v. May*, 7 Fla. 207, 68 Am. Dec. 431; *Davis v. French*, 20 Me. 21, 37 Am. Dec. 36; *Lyon v. Hays*, 30 Ala. 430; *Woods v. Ridley*, 27 Miss. 119, 149. As to his promise to a creditor barred by limitation, see *Oates v. Lilly*, 84 N. C. 643; *McGrath v. Barnes*, 13 S. C. 328, 36 Am. Rep. 687. And see *Bacon v. Thorp*, 27 Conn. 251; 255.

<sup>3</sup> See *Woods v. Ridley*, 27 Miss. 119, 149.

<sup>4</sup> *Stoudenmeier v. Williamson*, 29 Ala. 558; *Lockwood v. Gilson*, 12 Ohio St. 526 (warranty of title). And see cs. 4, 5, *post*; also Part VII, as to allowances in accounts.

<sup>5</sup> *Smith v. Haskins*, 7 J. J. Marsh. 502; *Munroe v. Holmes*, 9 Allen, 244 (administrator *de bonis non* to indemnify). The safer and the usual course, however, is for an executor or administrator to advance nothing and incur no expenditure or charge



261. **Assets recovered on his own contract** by the representative enure to the estate.<sup>1</sup>

262. **An estate ought not to derive any unjust or unconscientious advantage** from the representative's misconduct.<sup>2</sup> One should not claim a right in behalf of the estate he represents, founded upon the tort or fraud of the decedent;<sup>3</sup> nor be heard to assert for his justification that his own fraud or violation of law redounded to the benefit of the estate.<sup>4</sup>

263. **Executors or administrators by their admissions bind the estate;**<sup>5</sup> but such admissions or declarations by a representative are only competent evidence as to his own acts after he became clothed with the trust.<sup>6</sup>

264. **In American practice the representative proceeds upon qualification to perform his duties** according to the terms expressed in his probate credentials, and subject to the conditions of his probate bond, which serves as security to those interested in the estate, being filed in the probate registry.<sup>7</sup> But an executor, trustee, or other fiduciary cannot have an authority conferred upon him, not in some measure subject to the control and supervision of the probate and chancery tribunals; as in compelling

beyond the value of chattels in hand, or assets as actually realized; thus relying simply upon his lien to reimburse himself, or else his contemporaneous appropriation of chattels instead, by way of election; in which case the final settlement of his accounts involves a mere transfer of the just balance or residue to the successors, and avoids the disadvantage of an active pursuance of remedies against the latter. The power of the probate court extends only to the assets of the estate. *Clement v. Hawkins*, 16 Miss. 339. See 82 P. 384, 147 Cal. 725.

If at the time of the original executor's or administrator's decease or removal there should remain personal assets in his hands, enough may be retained to satisfy the balance found due on an accounting of his administration. Otherwise, personal assets coming to the hands of the representative *de bonis non* are justly applicable to settling this balance; and, if no personal assets, real estate of the deceased may equitably be reached; the difficulty is only the practical one as to the best mode of thus enforcing the charge against the estate when the first representative's lien is wanting. See Hoar, J., in *Munroe v. Holmes*, 13 Allen, 109. And see *Maraman v. Trunnell*, 3 Met. (Ky.) 146, 77 Am. Dec. 167.

<sup>1</sup> 14 Mass. 327; *Smith v. Wilmington Coal Co.*, 83 Ill. 498.

<sup>2</sup> *Able v. Chandler*, 12 Tex. 88, 62 Am. Dec. 518; *Cock v. Carson*, 38 Tex. 284.

<sup>3</sup> *Armstrong v. Stovall*, 26 Miss. 275.

<sup>4</sup> *Crump v. Williams*, 56 Ga. 590. Yet in a sale of assets the rule is *caveat emptor*. 361 *post*.

<sup>5</sup> *Sample v. Liscomb*, 18 Ga. 687. And see 18 Ga. 746.

<sup>6</sup> *Godbee v. Sapp*, 53 Ga. 283; *Gibson v. Lowndes*, 28 S. C. 285. See further, *Maddox v. Apperson*, 14 Lea, 596; *Sheldon v. Warner*, 59 Mich. 444, 26 N. W. 667.

<sup>7</sup> Creditors who are aggrieved can have ready recourse to the common-law tribunals; besides which, various local statutes provide the means of authenticating and filing their claims at the probate office. See Part V, *post*, as to the payment, etc., of claims. Probate or equity tribunals seldom interfere with specific assets. *Marston v. Paulding*, 10 Paige, 40; *Crawford v. Elliott*, 1 Bailey, 206. As to English "bills for administration," see *Wms. Exrs.* 942; 14 Q. B. 504. And see *Ashburn v. Ashburn*, 16 Ga. 213.

accounts and passing upon their allowance or by removing from trust and sanctioning suit upon breach of bond.<sup>1</sup>

265. **Executors and administrators may by bill in the nature of interpleader**, take the advice of chancery upon questions connected with the discharge of their duties. But the interposition of the court in such case is discretionary, and will not be exercised except under special circumstances and in matters of importance involving one's own immediate course of action.<sup>2</sup>

266. **In suits for annulling a decedent's marriage** the executor or administrator is not the proper representative; and statutes which sanction such proceedings leave it rather to children or relatives to take that momentous responsibility.<sup>3</sup>

267. **A distinction is drawn in the books between chattels personal and chattels real**, as to the vesting of possession in the representative. The property of personal chattels draws to it the possession, and hence, as to all such property of the deceased, wherever situated, the representative acquires possessory title at once.<sup>4</sup> But as to chattels real, leases, and other chattel interests in things immovable, including tenancies at will or from year to year, of these the representative, though potentially owner, is not deemed to be in possession before entry.<sup>5</sup>

268. **Where the legal representative manages the estate with the aid of some attorney of his choice**, or agent or counsel, the rule is, that one delegated to a trust cannot delegate that trust to another; so that ultimately the official discretion and responsibility become his own.<sup>6</sup>

<sup>1</sup> A purely arbitrary discretion, independent of the judicial rules which govern the settlement of estates, is not to be exercised by an executor, nor is the testator presumed to have intended conferring it. *Holcomb v. Holcomb*, 11 N. J. Ed. 281; *Wadsworth v. Chick*, 55 Tex. 241; *Hull v. Hull*, 24 N. Y. 647.

<sup>2</sup> *Crosby v. Mason*, 32 Conn. 482; *Parker v. Parker*, 119 Mass. 478; *Annin v. Vandoren*, 14 N. J. Eq. 135; *Goodhue v. Clark*, 37 N. H. 525; *Houston v. Howie*, 84 N. C. 349; 47 Barb. 304; *Shewmake v. Johnson*, 57 Ga. 75. See as to administrators, 7 Conn. 315; *McNeill v. McNeill*, 36 Ala. 109, 76 Am. Dec. 320; 21 Ga. 442. And see *Minot v. Taylor*, 129 Mass. 160 (remote contingencies); 65 A. 739 (N. J. Ch. 1907); *Rexford v. Wells*, 13 W. Va. 812. And see further, 109 Mass. 509. Cf. *Sellers v. Sellers*, 35 Ala. 235. Some local statutes are found, particularly in regard to getting instructions from the probate court after a less formal fashion.

<sup>3</sup> *Pengree v. Goodrich*, 41 Vt. 47.

<sup>4</sup> *Wentw. Off. Ex.* 228, 14th ed.; *Wms. Exrs.* 635; *Doe v. Porter*, 3 T. R. 13; *Taylor Landl. & Ten.* § 434.

<sup>5</sup> *Ib.* And see *supra*, 223. And see further, *T. Jones*, 170; *Barnett v. Guilford*, 11 Ex. 20, 32. This requirement appears to be so as not to force the representative to assume the liabilities of tenant.

<sup>6</sup> *Supra*, 109; 8 Port. (Ala.) 343; *Bird v. Jones*, 5 La. Ann. 645; 111 N. W. 1012, 134 Iowa, 345; 96 N. W. 1067, 134 Mich. 645; 89 P. 377, 49 Ore. 127. A power of disposition given under a will to executors, which is a personal trust, cannot, therefore,

268a. No property in the body of his decedent passes to the representative.<sup>1</sup>

268b. Lapse of time, such as bars out remedies, may limit the representative's obligation to answer for or inquire into the transactions of his decedent.<sup>2</sup>

as a rule, be executed by attorney. 9 Co. 75 b; Wms. Exrs. 943, 951; Williams v. Mattocks, 3 Vt. 189; 4 Johns. Ch. 368; Newton v. Bronson, 13 N. Y. 587, 67 Am. Dec. 89; Terrell v. McCown, 91 Tex. 231, 43 S. W. 2. And see Neal v. Patten, 47 Ga. 73. See 321, as to employing agents, etc.

<sup>1</sup> Apart from some enabling statute he cannot sue for injury or mutilation to the corpse, though he might sue for corresponding injury to the garments which the decedent wore when he perished. Griffith v. Charlotte R., 23 S. C. 25, 55 Am. Rep. 1. Cf. 211, 283.

<sup>2</sup> Allott v. Smith (1895) 2 Ch. 111 (twenty years before the person died).

## CHAPTER II.

## COLLECTION OF THE ASSETS.

269. To bring all the assets into his personal control is the duty and right of the executor or administrator, as soon as he shall have lawfully taken upon himself the execution of his office. Not being permitted to delay collecting the assets until he can first ascertain the amount of the debts, the whole of the assets, for aught he can know, may be wanted for paying them; and hence it becomes his duty to collect them with all reasonable diligence; and the law supplies him with the means adequate for that end.<sup>1</sup>

270. There are local statute methods for discovering assets in aid of the representative's pursuit.<sup>2</sup>

271. An executor or administrator may file a bill in chancery against one who intermeddles with or embezzles goods of the estate, instead of proceeding at law, so some codes permit.<sup>3</sup>

272. As to one's power to enter premises forcibly in pursuit of assets, there are some ancient restraining authorities, relating chiefly, if not altogether, to controversies with the heir who occupies the decedent's dwelling-house;<sup>4</sup> and modern adjudication upon these

<sup>1</sup> See *Eisenbise v. Eisenbise*, 4 Watts, 134, 136; *Page v. Tucker*, 54 Cal. 121. The decedent's personal property vests in the representative for paying debts immediately, and more remotely legacies or distributive shares; in a word, for administration according to the requirements of law, with, it may be, the provisions of the decedent's last will. His duty to collect with reasonable care and diligence is quite independent of any demand or request from creditors or distributees of the estate. *Harrington v. Keteltas*, 92 N. Y. 40; *Grant v. Reese*, 94 N. C. 720.

<sup>2</sup> *Arnold v. Sabin*, 4 Cush. 46; *Martin v. Clapp*, 99 Mass. 470. With reference to issuing a search warrant under New York statute, see *Public Administrator v. Ward*, 3 Bradf. 244; 2 Dem. 296, 396. See also *Eans v. Eans*, 79 Mo. 53. As to how far such proceedings may be constitutionally pressed, see 105 Cal. 600; 20 Hun, 462.

The remedies thus afforded may enable the executor or administrator to push inquiries, advantageous as a preliminary to instituting proceedings, civil or criminal, before the usual tribunals, besides vindicating his own zeal in seeking out the property. And so favored is this summary inquisition, in connection with the settlement of estates, that parties interested may themselves invoke it against the executor or administrator, where his own conduct lays him open to a corresponding suspicion. Many such statutes permit inquisition only, as the basis of proceedings elsewhere, unless the suspected party surrenders the property; but local legislation may differ in such respects. See 77 S. W. 552, 178 Mo. 248; 50 N. W. 1086, 90 Mich. 1; 116 N. W. 317, 138 Iowa, 513.

<sup>3</sup> 3 Blackf. (Ind.) 504; *Hensley v. Dennis*, 1 Ind. 471. And see as to special suit for damages, *Roys v. Roys*, 13 Vt. 543. The common-law right of suing in trespass or trover is not otherwise restrained by this statute. *Ib.* See also 41 A. 1003, 21 R. I. 55; *Schraft v. Wolters*, 48 A. 782, 61 N. J. Eq. 467; 115 N. W. 142, 134 Wis. 532 (discovery and restoration sought).

<sup>4</sup> *Went. Off. Ex.* 81, 202; *Toller*, 255; *Wms. Exrs.* 926.

and collateral points appears to be wanting. Yet the case of one's proceeding upon premises occupied by the deceased, to take an inventory, to procure possession of the goods and effects, or even, as preliminary to all probate authority, to search for a will, is of constantly familiar occurrence. Such acts are often highly prudent, and indeed essential to be performed.<sup>1</sup>

273. **The duty to pursue and recover chattels or collect demands** depends in a great measure upon the means at the representative's command for doing so.<sup>2</sup>

274. **The duty to pursue or collect depends largely, too, upon the sperate or desperate character** of the claim itself; as to whether, for instance, the title of the deceased to such a corporeal thing or muniment can be clearly established against the adverse possessor or the reverse; or again, whether such a debt or claim is probably collectible or not, considering the debtor's own solvency.<sup>3</sup>

275. **The duty to pursue or collect depends also upon the means of knowledge** possessed by the representative.<sup>4</sup>

<sup>1</sup> It is submitted that as to the right of entering premises, forcing locks, and the like, the case of executor or administrator after qualification differs not fundamentally from that of bailee, custodian, unqualified representative, or suitable family representative; but that (1) the purpose should be a suitable one,—as to make an inventory or preliminary schedule, or to search for a will, or to take a lawful custody whether temporary or permanent; and that (2) this purpose should be executed with entire honesty and reasonable prudence. The application of the rule differs, however, with circumstances and as the proceeding on behalf of the estate proves to be resisted or not by others in interest and in prior possession of the premises or locked receptacle. The passages from our earlier writers have a strict reference only to the executor or administrator who comes in collision with that especial favorite of the old common law, the inheritor of the land. See *Cobbett v. Clutton*, 2 C. & P. 471. The representative should not unreasonably defer his duty of seeking possession, at all events. *Wms. Exrs.* 927. See *Rough v. Womer*, 76 Mich. 375, 43 N. W. 573.

<sup>2</sup> Whether slender assets shall be used in litigation for procuring personal property adversely held, or in realizing doubtful claims, the rule of prudence must decide; but it is certain that the representative of an estate is not bound to litigate or to undertake the enforcement of doubtful rights on behalf of the estate out of his own means; and if kindred, legatees, or others interested in prosecuting the right, think the effort worth making, they should at least offer to indemnify the representative against the cost, or perhaps advance the money. *Griswold v. Chandler*, 5 N. H. 492; *Andrews v. Tucker*, 7 Pick. 250; 8 Fost. 48; *Hepburn v. Hepburn*, 2 Bradf. (N. Y.) 74; *Smith v. Goethe*, 82 P. 384, 147 Cal. 725; *Harris v. Orr*, 33 S. E. 257, 46 W. Va. 261, 76 Am. St. Rep. 815.

<sup>3</sup> *Cook v. Cook*, 29 Md. 538; *Pool, Succession of*, 14 La. Ann. 677; 2 Dem. 147. A claim which is already outlawed need not be prosecuted. *Patterson v. Wadsworth*, 89 N. C. 407. That a debt might have been collected is not conclusive against the representative. *Anderson v. Piercy*, 20 W. Va. 282. But he ought to give some good excuse. 88 N. C. 416. See 308. No executor or administrator is bound to sue a worthless debt, but ordinary care and diligence is the true criterion of his duty. 308, *post*. In many instances a layman may be justified by taking professional advice as to whether to expend in litigation, or how far. See 544.

<sup>4</sup> *Sarah v. Gardner*, 24 Ala. 719; *Lukton v. Jenney*, 13 Pet. 381, 10 L. Ed. 210; 33 So. 946, 82 Miss. 93.

276. **Kindred or legatees have no right to hold assets** against the representative.<sup>1</sup> Nor can a creditor of the estate take such possession.<sup>2</sup>

277. **To come now to the representative's suit for recovering assets.** The personal representative has at common law the right of action to recover all debts due to the deceased, whether debts of record, as judgments or recognizances, or debts due on bonds and other contracts under seal, or debts due on simple contracts and simple promises, oral or written, which are not under seal.<sup>3</sup>

278. **To the rule that every personal action founded upon a contract obligation shall survive** to the personal representative, exceptions exist, deducible from the reason of the contract relation itself. Thus, where purely personal considerations are the foundation of the contract, as in the usual case of principal and agent, or master and servant, the death of either party puts an end to the relation and its incident obligations.<sup>4</sup>

279. **But as to actions founded, not in contract, but in some injury done** either to the person or the property of another, and for which only damages are recoverable, by way of recompense, the earlier doctrine of the common law has been that the action dies with the person who committed or the person who suffered the wrong.<sup>5</sup> Statutes, however, in the reign of Edward III, and later, changed considerably this rule often quite disadvantageous to an estate. And thus an injury done to the personal estate of the

<sup>1</sup> *Carlisle v. Burley*, 3 Greenl. 250; *Eisenbise v. Eisenbise*, 4 Watts, 134. If permissively in possession, it is presumably as a bailee. *Ib.* Cf. 61 S. W. 182, 160 Mo 372, 83 Am. St. Rep. 479.

<sup>2</sup> *Ib.* See *Ormsbee v. Piper*, 82 N. W. 36, 123 Mich. 265 (widow). Cf. 87 N. W. 621, 128 Mich. 509.

<sup>3</sup> *Allen v. Anderson*, 5 Hare, 163; *Wms. Exrs.* 786; *Lee v. Chase*, 58 Me. 432; *Owen v. State*, 25 Ind. 107; *Bailey v. Ormsby*, 3 Mo. 580. All such actions survive. So with a bond or covenant to indemnify. 5 B. & Ad. 78. For the title of representative, on his appointment, relates back to the decedent's death; but here he sues in a representative capacity only. 61 S. E. 957, 80 S. C. 432. See further, 299, *post*.

<sup>4</sup> *Farrow v. Wilson*, L. R. 4 C. P. 745. And see further, *Prec. Ch.* 173; *Wms. Exrs.* 789. As to *pro forma* suit on a life insurance policy, see *supra*, 211; *Lee v. Chase*, 58 Me. 432. As to an action to recover an annuity, see *Smith v. Smith*, 15 Lea, 93.

<sup>5</sup> *Wms. Exrs.* 790. Hence, the executor or administrator of the injured party could not bring an action for false imprisonment, assault or battery, or other physical injury suffered by his decedent. *Smith v. Sherman*, 4 Cush. 408; *Harker v. Clark*, 57 Cal. 245; *Anderson v. Arnold*, 79 Ky. 370. Nor could he sue for torts affecting the feelings or reputation of his decedent, such as seduction, libel, slander, deceit, or malicious prosecution. *Long v. Hitchcock*, 3 Ohio, 274; 5 Cush. 544; 1 Day, 285; 3 Hawks. 133; 10 S. & R. 31; *Sawyer v. Concord R.*, 58 N. H. 517; *Clark v. McClellan*, 9 Penn. St. 128 (Crim. con.). See distinctions here between contract and tort. *Wms. Exrs.* 789

decedent during his lifetime became distinguished from that suffered by his person.<sup>1</sup>

280. Where, therefore, the personal representative can show that damage has accrued to the personal estate of the deceased, through breach of the defendant's express or implied promise, the later rule is that he may sue at common law to recover damages, even though the action itself sound in tort.<sup>2</sup> But the decisions are somewhat confusing on this point; and it must not be supposed that the mere form of action shall conclude the question of survival of the right to sue; for it is the gist, rather, and substance of the action that must determine.<sup>3</sup>

281. Goods or chattels taken away, which continue as such in the hands of the wrong-doer, can be recovered by the representative; or, if sold, an action for money had and received will lie to recover their value.<sup>4</sup>

282. Under modern local statutes, this right of action is extended in terms more or less specific, where a wrong is suffered.<sup>5</sup>

<sup>1</sup> See 1 Saund. 217; Wms. Exrs. 790. Trespass or trover may, accordingly, be brought by the executor or administrator. Cro. Eliz. 377; Manwell v. Briggs, 17 Vt. 176; Potter v. Van Vranken, 36 N. Y. 619. And see 2 Ld. Raym. 973; Paine v. Ulmer, 7 Mass. 317; 4 Mod. 403; 12 Mod. 72; Wms. Exrs. 791.

<sup>2</sup> Knights v. Quarles, 4 Moore, 532 (carelessness in title); Alton v. Midland R., 19 C. B. N. s. 242 (loss of baggage). And see 279. Cf., as to distinguishing real property, *post*, 285.

<sup>3</sup> Chamberlain v. Williamson, 2 M. & S. 408; 4 Cush. 408; Kelley v. Riley, 106 Mass. 341, 8 Am. Rep. 336; Hovey v. Page, 55 Me. 142; Harrison v. Moseley, 31 Tex. 608; Shuler v. Millsaps, 71 N. C. 297, *contra*. E.g., breach of promise to marry. And see Fenlay v. Chirney, 20 Q. B. D. 494, 370, *post*; Long v. Morrison, 14 Ind. 595 (malpractice of physician); McKee v. Allen, 103 S. W. 76, 204 Mo. 650. Actions of deceit, as in the sale or exchange of property, do not at common law survive. Cutting v. Tower, 14 Gray, 183; Newsom v. Jackson, 29 Geo. 61; Coker v. Crozier, 5 Ala. 369; Henshaw v. Miller, 17 How. (U. S.) 212, 15 L. Ed. 222; Grim v. Carr, 51 Penn. St. 533; Wms. Exrs. 793. The law as to survival of actions is usually defined as the same whether plaintiff or defendant dies, and reciprocal in its operation.

<sup>4</sup> Potter v. Van Vranken, 36 N. Y. 619; 14 Mass. 232; 11 S. & R. 131; Manwell v. Briggs, 17 Vt. 176; 1 Post. 382; Elrod v. Alexander, 4 Heisk. 342; Wms. Exrs. 787 (replevin, detinue, etc.).

<sup>5</sup> All actions which would have survived, if commenced by or against the original party in his lifetime, may thus be commenced and prosecuted by and against his executors and administrators. Mass. Pub. Stats. c. 166, § 1; 4 Cush. 408. Actions of replevin, actions for goods taken and carried away or converted by the defendant to his own use, and actions against sheriffs for malfeasance or nonfeasance by themselves or their deputies, are among the causes specifically enumerated in American local statutes; causes, some of them, fairly privileged in this respect, irrespective of such legislation. In various States, actions for libel, or slander, are now found thus to survive. Nutting v. Goodridge, 46 Me. 82. Also actions for seduction. Shafer v. Grimes, 23 Iowa, 550. Actions for deceit. Haight v. Hoyt, 19 N. Y. 464. And actions for malpractice by a physician, apothecary, or attorney. Long v. Morrison, 14 Ind. 595, 77 Am. Dec. 72; Miller v. Wilson, 24 Penn. St. 114; Norton v. Sewall, 106 Mass. 145, 8 Am. Rep. 298. So, too, is a modern legislative disposition strongly manifested to enlarge and confirm the representative's remedies for such torts as may have been

283. **Instantaneous death affords a remarkable instance in which the rule of survival of actions has been enlarged by legislation.** At the common law an action could not be brought by one's executor or administrator to recover damages for causing the decedent's death; for the death of a human being afforded no ground for an action *ex delicto*, even when caused by another's wrongful act or neglect.<sup>1</sup> In view, chiefly, perhaps, of the great damages to which travellers in great numbers have become exposed in these modern days of wholesale transportation, the peculiar trust they are compelled to repose in those who undertake to carry them, and the sound policy of holding public transporting companies to the exercise of a reasonable care and diligence in managing their perilous business, statutes, both English and American, have been enacted during the present century, providing in substance that damages may be recovered, not only for personal injuries, but for causing one's death wrongfully and carelessly.<sup>2</sup>

284. **Actions founded on wrongs done to the freehold during the decedent's life did not survive at the common law.**<sup>3</sup> But this

committed against the person of his decedent; e.g., actions of tort for assault, battery, imprisonment, or other damage to the person. 106 Mass. 143, 8 Am. Rep. 298; 5 Cush. 543; *Conly v. Conly*, 121 Mass. 550. The sweeping language of kindred enactments in some States confers a survival of actions *ex delicto*, still more comprehensive. *Shafer v. Grimes*, 23 Iowa, 550; *Adams v. Williams*, 67 Miss. 38; 51 N. W. 75, 84 Iowa, 66 ("owner" of cattle injured); *Huggins v. Tole*, 1 Bush. 192; *Whitcomb v. Cook*, 38 Vt. 477 (actions for malicious arrest); *Hooper v. Gorham*, 45 Me. 209; 7 Gray, 544; *Blake v. Griswold*, 104 N. Y. 613, 11 N. E. 137 (statute penalty); *Brackett v. Griswold*, 103 N. Y. 425, 9 N. E. 438; *Baker v. Crandall*, 78 Mo. 584, 47 Am. Rep. 126. Cf. 110 U. S. 586; *Huff v. Watkins*, 20 S. C. 477; 41 Ark. 295, 48 Am. Rep. 41. Where pending one's action for personal injuries caused by negligence, the plaintiff dies from some other cause, the right of action survives. *Chicago R. v. O'Connor*, 119 Ill. 586, 9 N. E. 263. See *Pound v. Pound*, 64 Minn. 428, 67 N. W. 200; 111 Ala. 529, 20 So. 362; local codes.

<sup>1</sup> Wms. Exrs. 797; *Carey v. Berkshire R.*, 1 Cush. 475, 48 Am. Dec. 616; *Wyatt v. Williams*, 43 N. H. 102. Cf. *Kellow v. Central Iowa R.*, 68 Iowa, 470, 56 Am. Rep. 858, 23 N. W. 740, 27 N. W. 466 (living a few minutes after the injury).

<sup>2</sup> See Stat. 9 & 10 Vict. c. 93, cited Wms. Exrs. 796, and corresponding American statutes; not wholly confined, however, to corporations nor to the business of passenger carriage. See also, 98 Mass. 85; 23 N. Y. 465; *Glass v. Howell*, 2 Lea, 50. Many such statutes are rather for the benefit of surviving relatives than for the purpose of supplying assets for the decedent's general estate. See *supra*, 211. And cf. local statute.

The right of a representative to sue thus does not necessarily depend upon the question whether the deceased left a wife or family, but upon the right of the injured person to sue if he were living. *Quin v. Moore*, 15 N. Y. 432. The cause of action, where death was caused by another's wrong, abates upon the death of the wrong-doer. *Hegerich v. Keddle*, 99 N. Y. 258, 52 Am. Rep. 25, 1 N. E. 787; *Boor v. Lowrey*, 103 Ind. 468, 53 Am. Rep. 519; 370, *post*.

The broad underlying principle of all such legislation is to render persons liable in damages for inflicting an injury wantonly or negligently, whether the innocent sufferer by such tort dies before recovering recompense or not, and whether death ensues instantaneously or later.

<sup>3</sup> Wms. Exrs. 793; *Williams v. Breedon*, 1 B. & P. 329; 3 T. R. 13; *Kennerly v. Wilson*, 1 Md. 102; 1 Har. & M. 224; *Chalk v. McAilly*, 10 Rich. 92.



left injuries to a decedent's real property, committed during his lifetime, wholly unredressed; and legislation, both English and American, has much changed the rule.<sup>1</sup>

285. **But the right of action on behalf of a decedent's real estate has been denied** to the personal representative in various instances, on the principle that, the land having descended to the heirs or vested in devisees, the right of action vests more appropriately in them.<sup>2</sup>

286. **Executors and administrators may sue, usually, upon breaches of covenant under a deed** relating to the realty, which have occurred during the life of the decedent, so as to impair his personal estate; and also for breach under a lease.<sup>3</sup>

287. **Pews in a church are personal property** in some States with right of action accordingly.<sup>4</sup>

288. **In general, a suit in law or equity to recover the personal assets** of an estate, must be brought by the personal representative.<sup>5</sup>

289. **The executor or administrator cannot sue in his individual name** for demands due or rights accruing in his decedent's life-

<sup>1</sup> Wms. Exrs. 795, 796; 7 Ired L. 20; *Brown v. Dean*, 123 Mass. 254; 115 Mass. 552; 125 Mass. 166. Such damages when recovered by the personal representative appear to belong fitly to the personal estate of the decedent; the right of action and money compensation being, in essence, personal and not real property. See local statute.

<sup>2</sup> Where a covenant is purely collateral and does not run with the land, but its benefit, if unbroken, would pass to the representative as personal estate, it would appear to follow the usual rule of contracts as to survivorship; that is to say, the right of action for its breach passes, upon the death of the party, to his executor or administrator, and constitutes personal assets. *Raymond v. Fitch*, 2 Cr. M. & R. 588. And see *Ricketts v. Weaver*, 12 M. & W. 718 (lease). As to severed products, such as hay, corn, fruit, these are personal property. 1 B. & P. 330; 16 Cal. 574. As to growing crops, emblements, fixtures, etc., see 70 Me. 219; *supra*, 225-227. But where the covenant runs with the freehold, the right to sue will pass to the heirs of the covenantor or his assigns, and thus in many instances to the exclusion of the executor or administrator; as where breach is made of the covenant of warranty contained in a conveyance. Wms. Exrs. 801; 2 Lev. 26, 92. For modern precedents, see *Clark v. Swift*, 3 Met. 390; *Burnham v. Lasselle*, 35 Ind. 425; *Watson v. Blaine*, 12 S. & R. 131, 14 Am. Dec. 669; 21 W. Va. 440; 25 Colo. 360; 5 Taunt. 418; 4 M. & S. 188. See local statute.

<sup>3</sup> *Hamilton v. Wilson*, 4 Johns. 72, 4 Am. Dec. 253; *Chapman v. Holmes*, 5 Halst. 20; *Mitchell v. Warner*, 5 Conn. 497; *Garfield v. Williams*, 2 Vt. 327; *Clark v. Swift*, 3 Met. 390. And see *Knights v. Quarles*, 4 Moore. 532; *Taylor Landl. & Ten.* § 459. As to ejectment, see *Farrall v. Shea*, 66 Wis. 561, 29 N. W. 634; *Roberts v. Nelson*, 86 Mo. 21. See 301 *post*.

<sup>4</sup> *Perrin v. Granger*, 33 Vt. 101; 1 Schoul Pers. Prop. 158.

<sup>5</sup> *Pope v. Boyd*, 22 Ark. 535; *Hellen v. Wideman*, 10 Ala. 846; 12 Ark. 599; 11 B. Mon. 214; *Snow v. Snow*, 49 Me. 159; *Sears v. Carrier*, 4 Allen, 339; *Cheely v. Wells*, 33 Mo. 106; *Howell v. Howell*, 37 Mich. 124; 3 Edw. 48; 7 Watts, 159; *Linsensbigler v. Gourley*, 56 Pa. St. 166, 94 Am. Dec. 51; 1 Bay (S. C.) 58, 1 Am. Dec. 596; 1 McCord Ch. 191; *Baxter v. Buck*, 10 Vt. 548; *Webster v. Tibbits*, 19 Wis. 438. Order from probate court not needed. 14 Ga. 145; *Reid v. Butt*, 25 Ga. 28.

time to the estate which he represents, but must sue in his representative character;<sup>1</sup> while upon demands created or rights accruing since his decedent's death the reverse holds true.<sup>2</sup> But to this doctrine are apparent exceptions.<sup>3</sup>

290. We should conclude that the representative's right to sue, whether officially or in his own name, is to a great extent optional on his part, or else determined by the tenor of the instrument sued upon.<sup>4</sup>

291. Thus, where goods and chattels which belonged to the decedent at the time of his death are afterwards tortiously taken or wrongfully converted, the personal representative may optionally sue in his own name without calling himself executor or administrator; for the property vested in him on the death of his testator or intestate, and hence the wrong may be considered as done to himself.<sup>5</sup>

292. Upon a contract expressed or implied, made with the executor or administrator as such, after the death of his testator or intestate, the action may be brought by the representative in his own name;<sup>6</sup> though the opinion often sanctioned by English and American authorities is, that he may elect to sue either in his individual or his representative capacity.<sup>7</sup>

<sup>1</sup> *Tappan v. Tappan*, 10 Post. 50; *Patchen v. Wilson*, 4 Hill (N. Y.) 57; *Rogers v. Gooch*, 87 N. C. 442.

<sup>2</sup> *Kline v. Gathart*, 2 Penn. 491; 2 Harr. 164. See Appendix, *post*.

<sup>3</sup> As in promissory notes. *Goodman v. Walker*, 30 Ala. 482, 68 Am. Dec. 134; *Oglesby v. Gilmore*, 5 Ga. 56; *Gunn v. Hodge*, 32 Miss. 319; 4 McLean, 337; 11 Barb. 241; 2 McCord, 364; *Holcombe v. Beach*, 112 Mass. 450; *McGehee v. Slater*, 50 Ala. 431. See also *Laycock v. Oleson*, 60 Ill. 30; *Branch v. Branch*, 6 Fla. 314. And see 1 Ill. 13; *Carter v. Estes*, 11 Rich. 363; *Manwell v. Briggs*, 17 Vt. 176; 3 Greenl. 250.

<sup>4</sup> Where the executor or administrator sues on a contract made with his testator or intestate, he must, under such a rule, sue in his representative character, although the time for payment or performance had not arrived when the testator or intestate died. *Patchen v. Wilson*, 4 Hill, 57.

<sup>5</sup> 7 T. R. 358; *Patchen v. Wilson*, 4 Hill, 57, 58; 3 Greenl. 250; 23 Ala. 353, 58 Am. Dec. 296; *Skelheimer v. Chapman*, 32 Ala. 676; *Gage v. Johnson*, 20 Miss. 437; *Ham v. Henderson*, 50 Cal. 367. Not only may trover or trespass be maintained, and other actions of tort upon this principle, but likewise replevin. *Branch v. Branch*, 6 Fla. 314; *Snider v. Croy*, 2 Johns. 227 (wasting or destroying). Such action may be brought notwithstanding the tort was committed before letters were issued or a probate granted. *Wms. Exrs.* 876; 7 T. R. 358; *Hollis v. Smith*, 10 East, 294; 50 Cal. 369; 9 Wend. 302 (never in actual possession). As to allegation, see *Wms. Exrs.* 877. See further, *Bonafous v. Walker*, 2 T. R. 126.

<sup>6</sup> 6 Harr. 164; *supra*, 290. Otherwise where the contract was made with the testator or intestate himself. *Ib.* See Appendix, *post*.

<sup>7</sup> *Wms. Exrs.* 878, 879. See 3 B. & Ald. 365; 8 Port. 346; 5 Ga. 56; *Laycock v. Oleson*, 60 Ill. 30; *Gunn v. Hodge*, 32 Miss. 319; *Goodman v. Walker*, 30 Ala. 482, 68 Am. Dec. 134; 4 McLean, 337; *Patterson v. Patterson*, 59 N. Y. 574, 17 Am. Rep. 384; *Haskell v. Bowen*, 44 Vt. 579; 28 Barb. 473; 2 Murph. 384; *Mosman v. Bender*, 80 Mo. 579. It is observable that contracts made by a representative bind him in-

293. With respect to negotiable instruments, there are various decisions, pointing to the result that an executor or administrator may sue as such on a promissory note given or coming to him in that capacity after the death of his testate or intestate.<sup>1</sup> Upon a bill, note, or other negotiable instrument, which by suitable indorsement, or according to its original tenor, becomes payable to the bearer, the executor or administrator who holds it may, undoubtedly, like any "bearer," sue in his own name.<sup>2</sup> And he may sue in his own name on a promissory note payable to himself individually, which he takes as assets, and in general on a note given him in the course of his own dealings with the estate.<sup>3</sup>

294. We conclude that as to suing in individual or representative character upon a contract to result in assets for the estate, the modern rule allows here a liberal option.<sup>4</sup>

295. As to suits in equity, the executor or administrator of a deceased party may, in respect of the transmission of the interest to him, be admitted as his representative.<sup>5</sup> All equitable interests of the deceased, in the nature of assets, are justly enforceable in a court of equity by the executor or administrator suing in his representative capacity.<sup>6</sup>

dividually; and yet that of such contracts, some may be within the clear scope of one's official authority and some without it; and hence, perhaps, is a source of confusion in drawing the line. Were the contract clearly without the scope of his representative capacity, he would probably be compelled to sue upon it as an individual, if he could sue at all. On all causes of action, therefore, accruing after the decedent's death and included within the scope of his official powers, the preferable rule is that an executor or administrator may sue, either in his own individual or his representative capacity, at his option. *Mowry v. Adams*, 14 Mass. 327; 6 Barb. 330; *Knox v. Bigelow*, 15 Wis. 415; *Lawson v. Lawson*, 16 Gratt. 230, 80 Am. Dec. 702; 3 Rawle, 102; *Wms. Exrs.* 881; *Abbott v. Parfit*, L. R. 6 Q. B. 346; 12 M. & W. 637; 6 East, 410; *Bolingbroke v. Kerr*, L. R. 1 Ex. 222.

<sup>1</sup> 1 T. R. 487; 10 Bing. 55; 5 Price, 412; 3 C., 7 Price, 591; *Wms. Exrs.* 880; 5 B. & Ald. 204; *Baxter v. Buck*, 10 Vt. 548; *Litchfield v. Flint*, 104 N. Y. 543, 11 N. E. 58.

<sup>2</sup> *Holcombe v. Beach*, 112 Mass. 450; 11 Barb. 241; *McCord*, 364; *Sanford v. McCreedy*, 28 Wis. 103; *Rittenhouse v. Ammerman*, 64 Mo. 197, 27 Am. Rep. 215.

<sup>3</sup> *Laycock v. Oleson*, 60 Ill. 30; 8 Port. 346, and other cases cited *supra*, 292; *Baxter v. Buck*, 10 Vt. 548.

<sup>4</sup> See local practice code. But cf. *Price v. Moulton*, 10 C. B. 561; 5 Price, 419.

<sup>5</sup> *Wms. Exrs.* 890; *Cheney v. Gleason*, 125 Mass. 166; *Egremont v. Thompson*, L. R. 4 Ch. 448. See the statutes of the respective States for modern chancery practice in relation to reviving suits in equity.

<sup>6</sup> *Simmons v. Simmons*, 33 Gratt. 451; 1 Vern. 106 (for discovery, etc.); *supra*, 270; *Doe v. Guy*, 3 East, 123 (to compel a refund); *Williams v. Williams*, 2 Dev. Ch. 69, 22 Am. Dec. 729; *Thompson v. Stanhope*, Ambl. 737; 2 Eden, 329 (to restrain a publication of manuscripts); *Burrus v. Roulhac*, 2 Bush, 99 (to correct a fraud or mistake in title of specific assets); *Cheney v. Gleason*, 125 Mass. 166; *Rice v. Rice*, 107 Mich. 241, 65 N. W. 103. And see 2 Story Eq. Jur. § 946 *et seq.*; *Wms. Exrs.* 1901. No relief is afforded in equity on the ground of mistake, where the representative was culpable. *Stewart v. Stewart*, 31 Ala. 207.

296. **For specific notes or securities of the decedent** in the hands of a third party under a transfer and delivery fraudulently obtained, the representative has the right to sue for their value at law, as for a tort. But he may, instead, proceed to obtain them.<sup>1</sup>

297. **The representative's duty in pursuing assets fraudulently transferred** extends to all assets of the decedent which are applicable to the payment of debts.<sup>2</sup>

298. **The executor or administrator should have a right to arbitrate or compromise** any demand of the decedent which he represents, provided he act within the range of a reasonable discretion as to the true interests of the estate.<sup>3</sup>

299. **A contract right to decedent is well expressed for benefit of** "A, his executors or administrators," etc.; but such expression is not essential, if in fact the contract was not meant to be personal to decedent alone.<sup>4</sup>

300. **Where the expression "assigns," "next of kin," "heirs,"** etc., is employed, the right of action also rests usually in executor or administrator.<sup>5</sup>

301. **Where rent was in arrears,** the common law allowed of distraint.<sup>6</sup> But distress for rent is a remedy now mostly abolished in various parts of the United States.<sup>7</sup>

<sup>1</sup> Where replevin does not furnish an adequate remedy, he may bring a bill in equity to compel the delivery of the specific instruments to himself, and to restrain the holder from prosecuting suits at law upon such instruments, or parting with their possession; joining as parties to the bill those indebted upon the instruments. *Sears v. Currier*, 4 Allen, 339. But he should elect. And see *Morton v. Preston*, 18 Mich. 60, 100 Am. Dec. 146; *Burrus v. Roulhac*, 2 Bush. 39.

<sup>2</sup> *Welsh v. Welsh*, 105 Mass. 229. He may even institute proceedings for setting aside a fraudulent transfer made by the decedent; and if he neglects doing so, culpably, to the injury of creditors and others concerned in such assets, he renders himself liable as for other delinquency in the performance of his trust, and under like limitations. *Supra*, 213, 220; *Wms. Exrs.* 1679; *Cross v. Brown*, 51 N. H. 488; *Lee v. Chase*, 58 Me. 436; *Danzey v. Smith*, 4 Tex. 411; *Andrew v. Hinderman*, 71 Wis. 148, 36 N. W. 624. Cf. 2 *Desau*. 524. He may consequently maintain an action at law, or a suit in equity, for the purpose of setting aside a transfer or conveyance of personal property made by his decedent for the purpose of defrauding his creditors, notwithstanding the decedent himself would have been barred. 17 Mass. 222; 90 S. W. 848, 77 Ark. 60; 88 N. W. 452, 115 Iowa, 238, 91 Am. St. Rep. 165; *Wright v. Holmes*, 62 A. 507, 100 Me. 508, 3 L. R. A. (N. S.) 769; 8 Pick. 254; 4 La. Ann. 169; *Morris v. Morris*, 5 Mich. 171; *Brown v. Finley*, 18 Mo. 375; 2 Barb. 171; 55 Ohio St. 294, 45 N. E. 316.

<sup>3</sup> *Wamsley v. Wamsley*, 26 W. Va. 45 (arbitration). See c. 5, *post*, 386, 387.

<sup>4</sup> *Supra*, 277, 278; *Wms. Exrs.* 789; 2 P. *Wms.* 467; 304, *post*.

<sup>5</sup> As to "assigns," see *Wms. Exrs.* 789; 1 Leon. 316; *Plowd.* 288. But intent of contract governs. *Hob.* 9; *Wms. Exrs.* 886. As to "heirs," "next of kin," etc., see *Carr v. Roberts*, 5 B. & Ad. 78.

<sup>6</sup> See Co. Lit. 162 a; *Wms. Exrs.* 928-931.

<sup>7</sup> *Taylor Landl. & Ten.*, § 560. The personal representative may sue for arrears due decedent during his life. See 216, 286; 5 Cow. 501.

302. A condition stipulated with the deceased may enure to the benefit of the estate through the personal representative.<sup>1</sup>

303. By chattel remainder, etc., a right to sue, which never existed in the testator or intestate, may likewise accrue to the executor or administrator.<sup>2</sup>

304. There are other rights analogous where the deceased himself could not have sued, because of the peculiar tenor of the contract or covenant in question and the date of his death, and yet the right of action would accrue to the representative in his time.<sup>3</sup>

305. In pledge or collateral security, the right to redeem will pass to the personal representative of a deceased pledgor, subject to lapse of time as a barrier.<sup>4</sup> The death of a pledgee, moreover, does not impair a pledgor's right to redeem, for tender may be made to the executor or administrator of a deceased pledgee.<sup>5</sup> Other rules also here apply.<sup>6</sup>

306. Debts with mortgage or other security may be collected on maturity and the security discharged; or, if the debtor prove delinquent, the security may be enforced for the benefit of the estate. So, too, if the representative act fairly and with becoming prudence, the security may be renewed, extended, or changed (though not sacrificed), while the debt remains outstanding.<sup>7</sup>

<sup>1</sup> Wms. Exrs. 886. A representative may be charged with chattels which he failed to turn over to the estate in accordance with his own contract made with his decedent in the latter's lifetime. *More's Estate*, 121 Cal. 609.

<sup>2</sup> As in a peculiar lease. Co. Lit. 54 b; Wms. Exrs. 697, 885.

<sup>3</sup> That the right of action did not accrue to the testator or intestate himself is not fatal to the right of his representative; but the right itself being valuable the representative may avail himself of it at the proper time. See *Husband v. Pollard*, cited 2 P. Wms. 267; 1 Leon. 316; Plowd. 288; Wms. Exrs. 884, 885. See 282, 283, *supra*.

<sup>4</sup> Schoul. Bailm. § 250; *Cortelyou v. Lansing*, 2 Cain. 200; *Perry v. Craig*, 3 Mo. 516; *Jones v. Thurmond*, 5 Tex. 318; Wms. Exrs. 386.

<sup>5</sup> Schoul. Bailm. § 250; *Story Bailm.* §§ 345-348.

<sup>6</sup> Thus, a pledge of property belonging to the estate, cannot avail against the decedent's personal representative when made without authority from him; but *aliter* should the representative have sanctioned or participated in the pledge. *Jones v. Logan*, 50 Ala. 493. See further, 349, *post*. An executor's or administrator's duty to redeem a pledge follows the rule of prudence; for if the estate he represents is to be worse by such redemption, the preferable course seems to be, to let the secured creditor avail himself of the pledge and stand on the usual footing of creditors for his balance. See payment of claims, 430.

<sup>7</sup> See *Baldwin v. Hatchett*, 56 Ala. 561; *Mosman v. Bender*, 80 Mo. 579; 27 S. E. 648, 50 S. C. 169; *Gardner's Estate*, 49 A. 346, 199 Penn. 524. Loans upon security are often treated as investments, and accordingly sold and transferred instead of being called in. See next c.

307. Where growing crops on the land of the decedent are assets, the personal representative has a right to enter and take them, for he is accountable therefor.<sup>1</sup>

308. For want of due diligence or good faith in collecting or procuring assets, considering the means at his disposal, the representative will be held liable at their full value.<sup>2</sup>

309. Interest-bearing debts due the estate are to be collected, upon the usual observance of diligence and good faith, with interest as well as principal.<sup>3</sup>

310. Debts to be settled beneficially are usually to be paid in money or its equivalent.

<sup>1</sup> State v. Hogan, 2 Brev. 347; McCormick v. McCormick, 40 Miss. 700; McDaniel v. Johns, 8 Jones L. 414. See 226 *supra*.

<sup>2</sup> Lowson v. Copeland, 2 Bro. C. C. 156; 19 Beav. 271; Gates v. Whetstone, 8 S. C. 244, 28 Am. Rep. 284; Hall's Estate, 70 Vt. 458, 41 A. 508. See 313-317 (next chapter) as to the measure of a representative's liability; and as to whether "slight diligence" or "ordinary diligence" should be the standard. Whitney v. Peddicord, 63 Ill. 249 (note not desperate); Sanderson v. Sanderson, 20 Fla. 292. Especially is the representative liable, when other circumstances indicate a disposition biased to the person of the debtor. 88 N. C. 416. And see Munden v. Bailey, 70 Ala. 63; 88 Ind. 110 (ancillary appointee).

Hence, an executor or administrator who has been guilty of gross negligence or wilful default in failing to collect a debt due the estate will be personally charged with the debt, and sometimes with interest besides. 1 Madd. 290; cases, *supra*; Wms. Exrs. 1806; Schultz v. Pulver, 3 Paige, 182; 9 Ala. 491; 7 Ind. 545; 9 B. Mon. 540, 50 Am. Dec. 528; 8 Sm. & M. 682; Holcomb v. Holcomb, 11 N. J. Eq. 281; Charlton's Estate, 35 Penn. St. 473; Southall v. Taylor, 14 Gratt. 269; Oglesby v. Howard, 43 Ala. 144; 19 Fla. 300. But he is absolved, on the other hand, whenever he can show that his conduct was such as a prudent man, in the management of his own business, would have displayed, and that he had made proper exertion to collect, and had acted in good faith. Bryant v. Russell, 23 Pick. 546; Moore v. Beauchamp, 4 B. Mon. 71; 1 McMull. Ch. 153; 49 Ala. 353; Neff's Appeal, 57 Penn. St. 91; Gray v. Lynch, 8 Gill, 403. The rule of the text applies with its qualification where the representative forbears suing, takes security, etc., and the debtor absconds or proves insolvent. See Holmes v. Bridgman, 37 Vt. 28; Keller's Appeal, 8 Penn. St. 288, 49 Am. Dec. 516. Or subjects the estate to the liability of surety or indorser, when there was a principal debtor to pursue. Tuggle v. Gilbert, 1 Duv. 340; Chambers' Appeal, 11 Penn. St. 436; Utley v. Rawlins, 2 Dev. & B. Eq. 438; Keller's Appeal, 8 Penn. St. 288, 49 Am. Dec. 516. It is not culpable negligence to omit suing a debtor who is without means. 7 Gratt. 136, 160. And see 61 Miss. 641. Undue delay causing a loss to the estate is inexcusable. Wilson v. Lineburger, 88 N. C. 416; Anderson v. Piercy, 20 W. Va. 282. Cf. Jones L. 439. See further, 18 S. C. 1; 56 Vt. 264, 48 Am. Rep. 770.

<sup>3</sup> 308, *supra*. And see Ossipee v. Gafney, 56 N. H. 352 (usury).

<sup>4</sup> As to "legal tender" notes, see Jackson v. Chase, 98 Mass. 286. And cf. 32 Fed. 511; Glenn v. Glenn, 41 Ala. 571; Copeland v. McCue, 5 W. Va. 264; Lagarde's Succession, 20 La. Ann. 148; Shaw v. Coble, 63 N. C. 377; Hendry v. Cline, 29 Ark. 414. Fraudulently to permit the discharge of a debt in depreciated currency cannot be upheld. Williams v. Skinker, 25 Gratt. 507. But *bona fide* and prudent dealing should excuse one. Hutchinson v. Owen, 59 Ala. 326.

Land should not be taken in payment of debts, if its proceeds may be had instead; for usually a personal representative is not legally capable of dealing with such property and transferring title in a satisfactory manner. Weir v. Tate, 4 Ired. Eq. 264. See Part VI, *post*. But receiving personal property of the debtor or its avails, or the proceeds of his real estate, in satisfaction of the debt, or taking security, real or personal,

311. Where property is taken or money received through mistake, as assets, the representative must restore or refund to the party rightfully entitled. Applying the same knowingly in course of administration does not excuse him.<sup>1</sup>

for a future settlement, may be not only prudent but highly advantageous in the interests of an estate; and the representative who deals thus with a failing debtor, in the exercise of ordinary care and diligence, will not be chargeable for such of the indebtedness as he fails eventually to realize. *Neff's Appeal*, 57 Penn. St. 91. To accept, however, in satisfaction of a manifestly good and collectible claim, the assignment or transfer of property comparatively worthless, betrays culpable negligence if not positive dishonesty. *Bass v. Chambliss*, 9 La. Ann. 376; *Parham v. Stith*, 56 Miss. 465; *Scott v. Atchison*, 36 Tex. 76. As to application of proceeds in payment, see *Frith v. Lawrence*, 1 Paige, 434. And see *Caldwell v. McVickar*, 12 Ark. 746 (release executed); 20 W. Va. 282; 51 A. 44, 94 Md. 358. As to special arrangements for settling, see *Alvord v. Marsh*, 12 Allen, 603; *Biscoe v. Moore*, 12 Ark. 77; *Ross v. Cowden*, 7 W. & S. 376. The practice of selling claims against an estate to be used as offsets against debts due the estate is discountenanced by statute in some States. 25 Tex. 120. See 121 Cal. 609, 54 P. 97.

<sup>1</sup> *McCustian v. Ramey*, 33 Ark. 141.

## CHAPTER III.

## CARE, CUSTODY, AND MANAGEMENT OF THE ASSETS.

312. The care, custody, and management of the personal property belonging to the estate is an important function of administration.<sup>1</sup>

313. There is a certain standard of responsibility by which the personal representative's liability in this connection should be measured. Courts have defined that standard in many instances as in essence the responsibility of a bailee; of a gratuitous bailee or of a bailee for recompense, as the case may be.<sup>2</sup> Under all circumstances the fiduciary, like any bailee, must pursue his discretion honestly and in good faith.<sup>3</sup>

314. As for the simple care and custody of the personal property reduced to his corporeal possession and control, the executor or administrator is certainly bound like a bailee in point of responsibility, according to the current of modern opinion.<sup>4</sup>

315. A bailee serving with recompense is bound legally to the use of a greater measure of care and diligence than a bailee who

<sup>1</sup> The funds having been gathered in for the purpose of making disbursements in due order to creditors, legatees, and those entitled to the surplus, it may happen that a very large fortune is left in the keeping of the personal representative for a considerable period of time, much of it to be placed on deposit or kept in securities capable of being quickly converted into cash. To manage such a fund prudently may involve the collection of accruing dividends, interest, and income, and perhaps, in instances of necessary delay, an investment or re-investment of funds, and the putting of money or other personal property to such temporary use as may bring in a profit. Funds left invested as the decedent placed them require a like prudent supervision. A will, too, may direct investments to be made.

<sup>2</sup> Such a test is certainly a convenient one; and especially where applied to what is strictly the care and custody of assets already in the corporeal possession of the executor or administrator. But this fundamental doctrine of administration responsibility extends to the manner of procuring and collecting the assets, of managing the available funds, of making sales, of paying out, of distributing and winding up, and, in a word, of appropriating the decedent's estate to the just purposes of administration; hence we have what we may call the bailment standard of accountability applied to another relation, distinct, though in most respects analogous, namely, the fiduciary one. See Schoul. Bailments, §§ 1-5.

<sup>3</sup> *Brigham v. Morgan*, 69 N. E. 418, 185 Mass. 27. Even though the will should give one power to invest, etc., as the representative "shall think fit," this imports a discretion honestly exercised. *Smith v. Thompson*, (1896) 1 Ch. 71.

<sup>4</sup> See *Tarver v. Torrance*, 81 Ga. 261, 12 Am. St. Rep. 311, 6 S. E. 177; 2 Freem. 1; *Bailey v. Gould*, 4 Y. & C. 221; 57 A. 694, 76 Conn. 654, 100 Am. St. Rep. 1017; 96 N. W. 1067, 134 Mich. 645.



serves wholly without recompense.<sup>1</sup> Hence a difference may be found between English and American precedents.<sup>2</sup>

316. **This liability of a personal representative for all consequences resulting** from failure of the standard diligence or good faith requisite, while performing his trust, is traceable in various other connections elsewhere dwelt upon in this book.<sup>3</sup>

317. **To collect dividends, interest, or income upon invested funds, not lying idle,** is incumbent upon the executor or administrator, with the same measure of care, diligence, prudence, and good faith as applies to collecting and reducing to possession or keeping custody of the principal of the assets.<sup>4</sup> And as for choosing between keeping funds invested or suffering them to lie idle, the same prudent and faithful regard for the duties of his office should afford the criterion; the primary duty being to gather in, disburse and distribute with reasonable expedition.<sup>5</sup>

<sup>1</sup> Schoul. Bailm. §§ 13-15.

<sup>2</sup> In England an executor or administrator has not been recompensed. Hence, wilful default or "gross" negligence alone should charge him. See *Job v Job*, L. R. 6 Ch. D. 562; *Wms. Exrs.* 1807; 2 Vern. 299; 2 Ves Sen. 240.

On the other hand, in the courts of most or all of the United States, inasmuch as the executor or administrator is entitled to compensation for his service, we apprehend that the rule of liability must be stated more strongly, and so as to bind the representative to a measure of care and diligence corresponding to that of bailees for hire; in other words, so as to require, besides good faith on his part, that degree of care and diligence which men ordinarily prudent bestow in the management of their own affairs. See as to care and custody, etc., 3 Bradf. Sur. 13; 5 Rich. Eq. 220; *Rubottom v. Morrow*, 24 Ind. 202, 87 Am. Dec. 324; *Whitney v. Peddicord*, 63 Ill. 249; 2 Ashm. 437; *Cooper v. Williams*, 109 Ind. 270, 9 N. E. 917; 83 N. E. 1006, 170 Ind. 252, 127 Am. St. Rep. 363. And see as to stolen funds, *Stevens v. Gage*, 55 N. H. 175, 20 Am. Rep. 191; *Twitty v. Houser*, 7 S. C. 153; 53 Ala. 169. Losses allowed upon such a rule.

<sup>3</sup> As in procuring the assets, taking possession of the personalty, and realizing upon notes and other causes of action, see preceding chapter; 308, 310; 3 Munf. (Va.) 288; 1 Grant, 366; 8 S. C. 244, 28 Am. Rep. 284; *Stark v. Hunton*, 3 N. J. Eq. 300; *Neff's Appeal*, 57 Penn. St. 91. Or in getting a fraudulent transfer by his decedent set aside. *Danzey v. Smith*, 4 Tex. 411; *McLendon v. Woodward*, 25 Ga. 252. Or in selling, or in transferring the assets absolutely or by way of security. See next chapter; 11 Md. 41; 5 N. H. 492. Or in compromising claims whether against or in favor of the estate, adjusting controversies, prosecuting or defending suits, and submitting interests committed to his discretion to arbitration. *Woods v. Elliott*, 49 Miss. 168; *Hoke v. Hoke*, 12 W. Va. 427. Or in winding up the estate. *Cooper v. Cooper*, 77 Va. 198. And, in general, upon his accounting with the probate court for the due performance of his official duties. *Post*, Part VII, as to accounts; *Kee v. Kee*, 2 Gratt. 116. See c. 5, *post*; *Cock v. Carson*, 38 Tex. 284; *Williams v. Williams*, 79 N. C. 447, 28 Am. Rep. 333 (as between principal and ancillary); *Davis v. Chapman*, 83 Va. 67, 5 Am. St. Rep. 251, 1 S. E. 472. So, too, as concerns the conduct of a successor with reference to investigating the acts and conduct of his predecessor, or in one's placing the assets in other hands and employing an agent. *Ib.* For this bailment doctrine, being founded in sound common sense, permits of a wide range of analogous application.

<sup>4</sup> *Dorch v. Dorch*, 71 N. C. 224; *Ray v. Doughty*, 4 Blackf. 115. Usury thus received must be accounted for. *Proctor v. Terrill*, 8 B. Mon. 451.

<sup>5</sup> *Voorhees v. Stoothoff*, 6 Halst. 145; *Williams v. Maitland*, 1 Ired. Eq. 92; *Webb v. Bellinger*, 2 Desau. 482; *Calhoun's Estate*, 6 Watts, 185.

317a. All other things equal, there can be no better use for ready cash or funds on hand than in settling current demands upon the estate. And if the executor or administrator, instead of doing this, places the cash on deposit at interest, or otherwise invests the fund, he runs a risk of culpable loss.<sup>1</sup> But a bank deposit suitably distinguished may prove advantageous for drawing checks against it for current payments; and, since claims are not always payable at once in prudent administration, or especial delay may be occasioned, money not wanted for immediate payments may well be deposited in some bank of good standing, at interest or otherwise.<sup>2</sup>

318. Liens acquired by others in the decedent's lifetime hold good. The personal representative deals with liens as he finds them when his own title vests; and such liens he cannot disregard.<sup>3</sup>

319. A personal representative votes upon stock of his decedent sometimes.<sup>4</sup>

320. Putting raw assets into a salable condition may sometimes be permitted;<sup>5</sup> and the same may be said of repairing damaged goods, or finishing up his decedent's jobs, or procuring materials for the completion of contracts which were obligatory upon the estate, at all events, if remunerative.<sup>6</sup>

<sup>1</sup> Especially is this true, where he borrows or advances from some other source to meet these current demands. *Guthrie v. Wheeler*, 51 Conn. 207. And see *Black v. Hurlbut*, 73 Wis. 126, 40 N. W. 673; *Rogers v. Tullos*, 51 Miss. 685.

<sup>2</sup> *Guthrie v. Wheeler*, *supra* (pending a contest as to the validity of the will). And see *Jacobus v. Jacobus*, 37 N. J. Eq. 17; *Woodley v. Holley*, 111 N. C. 380, 16 S. E. 419. As to trust companies, etc., specially authorized for such deposits, cf. local statute. And see 1 Dem. 302; *Officer v. Officer*, 94 N. W. 947, 120 Iowa. 389, 98 Am. St. Rep. 365; 75 N. W. 1112, 73 Minn. 244. But the representative should not deposit in his individual name if he wishes to escape personal liability for losses. See *Williams v. Williams*, 55 Wis. 300, 42 Am. Rep. 708, and numerous cases cited. Some cases protect one's representative character where the form of account enables the identity of the trust deposit to be traced and distinguished. See *Summers v. Reynolds*, 95 N. C. 404.

<sup>3</sup> As to due prudence in paying assessments upon stock as assets, see *Ripley v. Sampson*, 10 Pick. 373; *Tuttle v. Robinson*, 33 N. H. 104; 71 P. 344, 138 Cal. 334 (chattel mortgagee); 72 P. 860, 67 Kan. 83. As to excluding a right of stoppage by a seller, see 110 S. W. 594, 86 Ark. 186. Taxes must be paid on personalty, so far as the public lien holds good. He cannot in his representative capacity create a lien on the assets for a debt due during the decedent's lifetime so as to impair the rights of other creditors. *Ford v. Russell*, 1 Freem. Ch. 42; Ga. Dec. Part II, 7; *supra*, 256. Nor can he bind an insolvent estate by his agreement in such a manner as to take assets out of the legal course of distribution with preferences, provided for by that contingency. *James's Appeal*, 88 Penn. St. 55.

<sup>4</sup> *Pike County v. Rowland*, 94 Penn. St. 238.

<sup>5</sup> *Whitley v. Alexander*, 73 N. C. 444.

<sup>6</sup> 9 Phila. 358. But the usual rule of prudence applies. See *Lacey v. Davis*, 4 Redf. (N. Y.) 402 (should not waste).

321. **The responsibility of the representative for acts of his own agent or attorney** applies also the standard rule of diligence and good faith.<sup>1</sup>

322. **If, in pursuance of his trust, considerable sums of money must necessarily lie idle for some time**, the personal representative is not only permitted, but encouraged, according to the usual rule, to allow quick assets which are productive to stand for a time uncollected; or he may put the money where it can draw interest, and even invest funds in interest-bearing securities.<sup>2</sup> But the rule of suitable prudence and diligence, as well as good faith, is still exacted under such circumstances; and this, moreover, with special consideration, both to the legislative policy of the State or country, as concerns investments by an executor or administrator, and the time and mode of settling the estate.<sup>3</sup>

323. **To an executor's or administrator's investments**, the doctrine of diligence and good faith applies. If such an official is to invest funds at all he should have a reasonable time in which to

<sup>1</sup> *Green v. Hanberry*, 2 Brock. 403. A hired bailee responds in general for the negligent and unskilful work of his own sub-agents or servants just as though his own want of ordinary diligence, not theirs, caused the damage. See Schoul. Bailm. § 19. The scope of the sub-agent's authority is material. As to thefts, etc., outside such scope the question is, whether the bailee used ordinary diligence in the choice and continuous employment of such person or in following him up. *Ib.* And see *Brier, Re*, 26 Ch. D. 238; *Wakeman v. Hazleton*, 3 Barb. Ch. 148; 2 B. Mon. 69; 296, *supra*. Not responsible for a dishonest and insolvent lawyer, employed prudently and in good faith to collect claims, where loss to the estate is thereby occasioned. 3 Johns. Ch. 578; 1 Scam. (Ill.) 75. Nor in losing by mistake remedies pursued in good faith and under the advice of competent counsel. 1 Pen. & W. (Penn.) 188; 4 Johns. Ch. 619. *Semble* the attorney should be pursued if legally answerable and pecuniarily responsible, on behalf of the estate. Any bailee may sue his sub-bailee for negligent performance, causing him damage. *McGill v. Monette*, 37 Ala. 49. And see *Calhoun's Estate*, 6 Watts, 185; 1 Iowa, 591, 63 Am. Dec. 466; *Bacon v. Bacon*, 5 Ves. 335; 3 M. & Cr. 497. And as to auctioneer, see *Edmond v. Peake*, 7 Beav. 239. But if the executor or administrator trusts assets in a careless manner, or to those he had no right or no need to employ, he is liable to the estate for the ill consequences. 1 Anstr. 107; *Ghost v. Waller*, 9 Beav. 497; *Matthews v. Brise*, 6 Beav. 239; *McCloskey v. Gleason*, 56 Vt. 264, 48 Am. Rep. 770; *Earle v. Earle*, 93 N. Y. 104. Some of the old cases rule more harshly. 6 Mod. 93; 2 Sch. & Lef. 243; *Wms. Exrs.* 1816, 1820. And see *Clough v. Bond*, 3 My. & Cr. 496. See Stat. 22 & 23 Vict. c. 35, § 28, modifying the harsher rule; *Wms. Exrs.* 1828. And see *Lyon v. Lyon*, 1 Tenn. Ch. 225.

<sup>2</sup> *Moore v. Felkel*, 7 Fla. 44; *Dortch v. Dortch*, 71 N. C. 224.

<sup>3</sup> *Wood v. Myrick*, 17 Minn. 408; *Dortch v. Dortch*, 71 N. C. 224.

Any savings or accumulations out of the estate, together with interest, dividends, and income, become assets in the hands of the personal representative, to be divided and paid over in the same manner as the principal fund. *Wingate v. Pool*, 25 Ill. 118; 317a. See *Cheever v. Ellis*, 96 N. W. 1067, 134 Mich. 645 (failure to realize a profit). Legislative directions with regard to such matters should be strictly heeded. 25 Hun. 341; 11 La. Ann. 279, 12 La. Ann. 445; 4 Md. 493; *Wms. Exrs.* 1818. In general, however, the rule of good faith and due diligence applies. 315, *supra*; *Wms. Exrs.* 1818; *Norwood v. Harness*, 98 Ind. 134, 49 Am. Rep. 739; *Welch's Estate*, 110 Cal. 605, 42 P. 1089.

do so.<sup>1</sup> As to the precautions to be taken and the extent to which the representative may lend with reference to the value of property for investment, there are numerous decisions such as apply to other fiduciaries.<sup>2</sup>

324. **Where no particular restrictions are imposed by law upon the fiduciary**, as to the kinds of securities in which the trust funds shall be placed; or the mode of making investments, the general rule of fiduciary liability still applies which we have been discussing, viz.: that the fiduciary shall act with honor and shall exercise a sound and reasonable discretion, like men of ordinary prudence in conducting such affairs.<sup>3</sup>

<sup>1</sup> See 78 Va. 665.

<sup>2</sup> *Brown v. Litton*, 1 P. Wms. 141; *Stickney v. Sewell*, 1 M. & Cr. 8; *Ingle v. Partridge*, 34 Beav. 411; *Bogart v. Van Velsor*, 4 Edw. Ch. 718; Wms. Exrs. 1808. These relate chiefly to first-class or ample mortgages of real estate. As to leave of court, see Wms. Exrs. 1809-11. And see *Wilson v. Staats*, 33 N. J. Eq. 524. Long loans upon inconvertible security are undesirable in settling an estate.

An investment of personal assets in real estate, being technically a conversion, is not proper on the representative's part unless it becomes necessary to save the estate from loss. See *Brigham v. Morgan*, 69 N. E. 418, 185 Mass. 27; 20 Hun, 537; *Perrine v. Vreeland*, 33 N. J. Eq. 102, 596; *Richardson v. McLemore*, 60 Miss. 315; Part VI, *post*.

<sup>3</sup> *Kinmonth v. Brigham*, 5 Allen, 277; 20 Pick. 119, 32 Am. Dec. 206. But the usual English requirement is that of investment in public (if not real) securities under chancery direction. *Holland v. Hughes*, 16 Ves. 114. Statutes extend the choice to other parts of the United Kingdom. See 6 Beav. 239; Wms. Exrs. 1810, 1811; 3 B. & Ald. 360.

The subject is, to a large extent, controlled in this country by local statutes which vary considerably in the range of selection permitted to the fiduciary. But the policy so strongly inculcated in British jurisprudence, of using accumulated wealth, transmitted from the dead to the living, to strengthen the hands of government, by causing its investment in the national soil and the public debt, finds less favor in America. Here individual fortunes, so far as they remain undispersed and are left to accumulate, aid rather in stimulating private enterprises, near and remote, and in reclaiming the wilderness, and peopling and developing new States; while the nation itself makes no general directions for investment and cannot interfere. Concerning investments in "Confederate securities" during the Southern conflict of 1861, various decisions are found of rather temporary application. See 40 Miss. 704; 12 Rich. Eq. 410; 75 Va. 792; 5 W. Va. 264; *Sharpe v. Rockwood*, 78 Va. 24. State securities, even under valid legislative authority, have not in all instances proved a judicious investment for trust moneys. *Perry v. Smout*, 23 Gratt. 241. See 17 Wall. 570, 21 L. Ed. 657. See Part V, *post*, as to legacies, etc. Investments left by the decedent in a particular kind of security might, if prudent, be fairly reinvested in the same or a similar security. *Brown v. Campbell*, Hopk. 233; 20 Barb. 100. Trust investments in corporate or individual bonds and notes are quite generally sanctioned in the several States; but the classes of permissible securities are often clearly specified by statute; and investment in the unsecured bond or note of an individual is not usually allowable as prudent. *Lacy v. Stamper*, 27 Gratt. 42; *Tucker v. Tucker*, 33 N. J. Eq. 235. See further, 2 Redf. (N. Y.) 333, 349, 421, 465; 35 N. J. Eq. 134, 467; 329, *post*. And see 2 Dem. 567; 4 Redf. 402. As to paying in depreciated currency, see *Rogers v. Tullos*, 51 Miss. 685.

In some States an executor or administrator who lends or invests funds of the estate without an order from the probate court, does so at his own risk. *Garesche v. Priest*, 78 Mo. 126. Cf. 9 Sm. & M. 339. Investments or loans to an individual without security at all, or upon poor security, is not permissible. 39 N. J. Eq. 249;

325. **An administrator is not justified in placing or leaving assets in trade**, for this is a hazardous use to permit of trust moneys; besides which, trading lies outside the proper scope of administration functions. Under circumstances not clearly imprudent, however, an executor may pursue an authority which was plainly conferred upon him by the will in this respect; though less as an executor, perhaps, than as one specially honored or burdened by his testator's personal confidence.<sup>1</sup> For the loss of assets placed or left by him in trade, the representative may, therefore, be usually charged, as for his imprudence or breach of trust.<sup>2</sup> But as to withdrawing assets from a partnership, or closing out a business in which the decedent was engaged, a wider discretion must occasionally be conceded to the personal representative; for this duty must be performed with a prudent regard to time, opportunity, and other circumstances.<sup>3</sup> These principles apply to speculative investments of all kinds, with the assets.<sup>4</sup>

326. **The liability of a deceased copartner, as well as his interest in the profits** of the concern, may, by the copartnership contract, be continued beyond his death.<sup>5</sup> Without such stipulation, however, death would dissolve the firm, even where the copartnership was expressed to be for a term of years.<sup>6</sup> With such a contract

19 Fla. 300. But as to settling with a failing debtor, etc., see 92 N. C. 437, 53 Am. Rep. 419; 14 Atl. 158, 120 Pa. St. 344; 310, *supra*. Stock in a trading company is not usually suitable. *Reed v. Reed*, 68 A. 849, 80 Conn. 401.

<sup>1</sup> Chancery here keeps a protecting direction. *Whitman's Estate*, 45 A. 673, 185 Penn. 144.

<sup>2</sup> *Wms. Exrs.* 1792, 1793; 1 T. R. 295; *Garland, Ex parte*, 10 Ves. 129; *Burwell v. Mandeville*, 2 How. 560, 11 L. Ed. 378; 7 Conn. 307, 18 Am. Dec. 111; 4 Johns. Ch. 619; *Lucht v. Behrens*, 28 Ohio St. 231, 22 Am. Rep. 378; *Stedman v. Fiedler*, 20 N. Y. 437. Cases, *supra*. And see 8 Conn. 584, 21 Am. Dec. 703; *Muntz v. Brown*, 11 La. Ann. 472; *Lucht v. Behrens*, 23 Ohio St. 231, 13 Am. Rep. 233; *Merritt v. Merritt*, 60 Mo. 150; *Matthews' Appeal*, 57 A. 694, 76 Conn. 654, 100 Am. St. Rep. 1017; 71 N. E. 543, 186 Mass. 259. Cf. *Simpson v. Chapman*, 5 De G. M. & G. 154. And see *Caskie v. Harrison*, 76 Va. 85 (surviving partner as executor). But if the trade prove advantageous, parties interested in the estate are not debarred from claiming the profits of the investment as theirs. *Robinett's Appeal*, 36 Penn. St. 174.

<sup>3</sup> See *Thompson v. Brown*, 4 Johns. Ch. 619; *Merritt v. Merritt*, 60 Mo. 150; 1 Dem. 547 (estate of a school teacher); *Stern's Appeal*, 95 Penn. St. 504.

<sup>4</sup> The personal representative incurs all the risks and is entitled to none of the profits resulting from such transactions committed in breach of trust. But if assets came to him thus invested by the decedent, it is a question of prudence when and how he shall withdraw the fund; and though he is not justified in continuing the speculation, and involving the estate more deeply, a reasonable breadth of honest discretion should be allowed him, for closing the transaction. See *Perry Trusts*, § 454; *Tompkins v. Tompkins*, 18 S. C. 1.

<sup>5</sup> But not so as to contravene the rule against perpetuities. 88 Me. 131, 33 A. 788; *Schoul. Wills*, § 21.

<sup>6</sup> *Scholefield v. Eichelberger*, 7 Pet. 594, 8 L. Ed. 793. And see as to winding up, 325, *supra*; *Hamlin v. Mansfield*, 88 Me. 131, 33 A. 788; 153 Ill. 54, 46 Am. St. Rep. 867, 28 L. R. A. 129, 38 N. E. 937; *Meyer, Re*, 74 N. E. 1120, 181 N. Y. 562; 83 S. W. 6, 98 Tex. 252.

the effect must be naturally to bind the estate of the deceased partner, in the hands of his executors or administrators, without compelling such representatives to become partners personally.<sup>1</sup>

327. **Perishable assets, and such as naturally depreciate on his hands,** the representative should seasonably dispose of, depositing, moreover, or investing the proceeds, or appropriating them in some other suitable mode.<sup>2</sup>

328. **As to calling in money already out on loan or investment,** the executor or administrator should observe due prudence and good faith, as in other instances;<sup>3</sup> but negligence in point of time

<sup>1</sup> *Downs v. Collins*, 6 Hare, 418. The active assent and participation of the representatives in the business appears, however, to subject them to the usual individual responsibilities of representatives who make contracts after the decedent's death with reference to the estate; the immediate effect being, like that of carrying on a trade, that they have a lien on assets for their indemnity if they had power to embark the estate in trade, but otherwise no lien. *Laughlin v. Lorenz*, 48 Penn. St. 275, 86 Am. Dec. 592; *Lucht v. Behrens*, 23 Ohio St. 231, 13 Am. Rep. 233; 11 S. & R. 41. Here the representatives incur a personal liability for the debts thereby contracted. *Laughlin v. Lorenz*, 48 Penn. St. 275, 86 Am. Dec. 592 (new firm composed of the personal representatives of the decedent and the surviving partner created); *Frey v. Eisenhardt*, 116 Mich. 160, 74 N. W. 501; *Leeds Banking Co., Re*, L. R. 1 Ch. 231, 242; *Evans, Re*, 34 Ch. D. 597. They are not absolved from accounting for the property. But they have a right in equity to indemnify themselves for the payment of such debts out of the property lawfully embarked in the trade. *Laible v. Ferry*, 32 N. J. Eq. 791; *Labouchere v. Tupper*, 11 Moore, P. C. 198. And see as to trade creditors, *Ib.* See also 48 Penn. St. 275, 86 Am. Dec. 592; 84 Fed. 420. And see *Jones, Re*, 103 N. Y. 621. Where, on the contrary, the executor or administrator carries on a trade without authority to do so, and the business proves disastrous, this will not of right involve the decedent's estate for the debts; but such assets as may be shown to have been wasted in the trade, those interested in the estate have the right to claim. The difficulties are practical ones, arising out of the representative's own insolvency, and the difficulty of tracing assets into the business. 10 Ves. 110; *Wms. Exrs.* 1793. And see *Lucht v. Behrens*, 23 Ohio St. 231, 13 Am. Rep. 233; *Pillgrem v. Pillgrem*, 45 L. T. 183; *Stanwood v. Owen*, 14 Gray, 195; 104 Mass. 583; *Wms. Exrs.* 1793; *Kirkman v. Booth*, 11 Beav. 273; *Jones v. Walker*, 103 U. S. 444, 26 L. Ed. 404. Only that part of the property which the testator prescribes or had left in his business is *prima facie* to be risked therein. *Wilson v. Fridenburg*, 21 Fla. 386; 5 Dem. 516. And see as to risk thus limited, *Stewart v. Robinson*, 115 N. Y. 328, 5 L. R. A. 410, 22 N. E. 160. A probate license may give some protection to the representative and those dealing with him. *Mustin's Estate*, 188 Penn. St. 544, 41 A. 618; 332, *post.* And so may assent of creditors and others interested. *Dowse v. Gorton*, (1891) A. C. 190; (1894) 2 Ch. 600. Statutes may be found on this topic. 86 S. W. 28 (Tex. Civ. App.) 252; 58 P. 521, 36 Or. 8.

<sup>2</sup> It often happens that a person beneficially interested will take such assets at their just valuation. *Woods v. Sullivan*, 1 Swan, 507; *Morton v. Smith*, 1 Desau. 128. As to dealing prudently with live stock, see *Fernandez, Re*, 119 Cal. 580, 51 P. 851.

<sup>3</sup> As where the will or local law authorizes only investments of a certain description, other than the assets in hand. It is well to sell disfavored assets early, unless the parties in interest or the court of probate or chancery expressly sanction delay. *Powell v. Evans*, 5 Ves. 839; 5 Pick. 96; 3 Gratt. 113; *Wms. Exrs.* 1806, 1815; *Moyle v. Moyle*, 2 Russ. & My. 710. The representative, is not liable upon a proper investment in an authorized fund for the fluctuations of that fund, but he is for the fluctuations of any unauthorized fund. *Clough v. Bond*, 3 My. & Cr. 496, *per* Lord Cottenham.

as to stocks and securities of speculating and fluctuating value is culpable, especially if payments to be made on behalf of the estate render the necessity urgent for realizing in cash promptly. Nevertheless, reasonable diligence and good faith are regarded in determining the representative's liability in such cases.<sup>1</sup>

**329. Where one loans or invests money belonging to the estate in a mode adverse to directions of the will or local law, even though honestly intending to benefit the estate, he becomes personally liable for loss should the security prove defective.**<sup>2</sup> Even where he invests in duly authorized securities, culpable carelessness or bad faith evinced in the conduct of the transaction will still render him chargeable.<sup>3</sup>

**330. Good faith, as in bailments and trusts, continues an element throughout,** in the representative's dealings with assets. All the acts of an executor or administrator are by intendment for the benefit of the estate; and he shall make no personal gain or loss, except as the compensation allowable on his accounts, for the reward of diligence, fidelity, and good management, may be thereby affected.<sup>4</sup> Moreover, the fiduciary character of the executor or administrator extends to all the parties interested with respect to their several rights and priorities. He cannot defraud creditors

<sup>1</sup> That the delay resulted on the whole advantageously for the estate may perhaps be sufficient exoneration. Nor can it be said that there is any fixed period at which loss by depreciation becomes chargeable absolutely to the representative himself; for it depends on the particular nature of the property, and the particular circumstances. Nor, in general, is it the duty of an executor or administrator to call in assets well and productively invested, where no undue risk is apparent, and the cash assets, together with collections, and the proceeds of less desirable investments, will suffice for all the immediate purposes of administration. It is the less secure investments and debts which demand one's keener vigilance. *Buxton v. Buxton*, 1 M. & Cr. 80; 3 Bradf. Sur. 199. See 18 S. C. 1; 42 N. J. Eq. 559, 9 A. 217 (statute). And see *Chapman. Re.* (1896) 2 Ch. 763.

<sup>2</sup> See 323-325. As, e.g., in individual loans without security. *Moore v. Hamilton*, 4 Fla. 112; 27 Gratt. 42; 20 La. Ann. 148; Probate Judge *v. Mathes*, 60 N. H. 433. But cf. 18 S. C. 544; *Wms. Exrs.* 1809; *Bacon v. Clark*, 3 M. & Cr. 294. Or on bad title, or on a second-class mortgage, and beyond two-thirds of the value of the mortgaged premises. 4 Edw. Ch. 718; *Wilson v. Staats*, 33 N. J. Eq. 524. And see 17 Ala. 109; 7 Blackf. 529.

<sup>3</sup> *Cason v. Cason*, 31 Miss. 578.

<sup>4</sup> See *post*, Part VII. c. 2, *Wms. Exrs.* 1842, 1967; 1 Bradf. 1; *Jacob*, 607. He should not misuse the funds for his own profit or at the risk of the estate. *Fosbrook v. Balguy*, 1 My. & K. 226; *Caulkins v. Bolton*, 98 N. Y. 511; *Callaghan v. Hill*, 1 S. & R. 241; *Kellar v. Beelor*, 5 T. B. Mon. 573; *post*, as to accounts. To lend to himself, or use for private profit is a breach of trust. 4 Barb. 626; 28 Penn. St. 480, 53 Ala. 169; 75 Va. 792; *Williams v. Williams*, 55 Wis. 300, 42 Am. Rep. 708, 13 N. W. 274. Nor acquire interests in or bargain for benefits from the property he controls; nor in general take for his own benefit a position in which his interests must conflict with his duty. *Sheldon v. Rice*, 30 Mich. 296, 18 Am. Rep. 136; *Landis v. Saxton*, 89 Mo. 375. Cf. 358, *post*.

for the sake of those entitled to the surplus; nor sacrifice one legatee or distributee for the benefit of the others.

331. **Executors and administrators should preserve the property of the deceased distinct**, in order that it may be known and readily traced.<sup>1</sup> But where, on the other hand, the executor or administrator commingles funds of the estate with his own, so that the separate identity of the trust fund cannot be traced, he is held accountable, at the option of the beneficiaries, as though for a conversion,<sup>2</sup> and interest is sometimes compounded on the fund by way of a penalty or in lieu of the estimated profits.<sup>3</sup>

332. **For acts performed under advice of the parties in interest**, or with their full assent, the liability of the representative is qualified.<sup>4</sup>

333. **So may the personal representative take the direction of the court**, and thus become qualified in liability.<sup>5</sup>

334. **Where control is taken by the court of probate or chancery**, or other paramount authority, one's strict fiduciary relation towards the fund so far ceases, together with his personal liability for its care and management.<sup>6</sup>

<sup>1</sup> *Hagthorp v. Hook*, 1 Gill & J. 270; 6 Ala. 337; *Robinett's Appeal*, 36 Penn. St. 174; 12 Leigh, 112. Property kept thus distinct cannot be subjected to claims upon the representative in his private capacity. *Branch Bank v. Wade*, 13 Ala. 427; 58 Ohio St. 207, 65 Am. St. Rep. 748, 50 N. E. 723; 153 Penn. St. 345, 25 A. 1119.

<sup>2</sup> *Henderson v. Henderson*, 58 Ala. 582. But see *Kirby v. State*, 51 Md. 383.

<sup>3</sup> *Gilbert's Appeal*, 78 Penn. St. 266; *Nettles v. McCown*, 5 S. C. 43; 85 P. 149, 149 Cal. 167; 85 N. W. 617, 113 Iowa, 351; 2 Woods, 357. The representative should not mingle what he holds in different capacities; such, for instance, as executor and guardian. *Hedrick v. Tuckwiller*, 20 W. Va. 489.

<sup>4</sup> He may prosecute or defend suits, compromise claims upon the estate, or deal with the estate in a particular way, not usual or strictly legal, as by continuing the property in business; and those parties in interest, by whose request or assent it has been done in good faith, will not be permitted to impute it as maladministration. *Poole v. Munday*, 103 Mass. 174; *Perry v. Wooten*, 5 Humph. 524 (indulgence of a debtor); *Watkins v. Stewart*, 78 Va. 111; 99 Ten. 462, 42 S. W. 199. And see *post*, Part VII, as to accounting. But parties in interest who give no such assent or authority can, of course, call his conduct to account. See *Orr v. Orr*, 34 S. C. 275, 13 S. E. 467.

<sup>5</sup> Enabling acts to be found in our codes permit the executor or administrator to consult the probate or county court in many instances, and take its direction after an inexpensive and summary course, notwithstanding he might have acted without its direction. Thus he may ask permission to make a certain sale or pledge of personal property, to invest or deposit after a certain manner, to change an investment, to compromise or submit to arbitration a specified claim, or to perform some contract of his decedent. But in most such cases, the executor or administrator may perform without an order of court upon the usual risks of a fiduciary, and the statute is not imperative in requiring him to seek judicial direction in advance. *Smith v. Wilmington Coal Co.*, 83 Ill. 498; *Richardson v. Knight*, 69 Me. 285. But see *Garesche v. Priest*, 78 Mo. 126. And see *Welch's Estate*, 110 Cal. 605, 42 P. 1089.

<sup>6</sup> *Hall's Appeal*, 40 Penn. St. 409; *Wms. Exrs.* 1809; 2 Meriv. 494. Local statutes are found investing the probate court with special authority in certain cases. See *Bacon v. Howard*, 20 Md. 191; 4 Bradf. 21; 5 Rich. Eq. 491; *Doogan v. Elliott*, 43



335. **Directions of the testator's will as to the deposit or investment of particular funds** are to be reasonably followed.<sup>1</sup> Oral instructions of the decedent, however, cannot justify a diversion of trust funds.<sup>2</sup> And even as to wills, the doctrine applies not without restrictions.<sup>3</sup>

336. **Thus the general doctrine of management becomes affected by positive requirements** of court, statute or the decedent's will; and here one should pursue honestly the line of duty prescribed and not deviate.<sup>4</sup>

337. **The principles discussed in this chapter bear a close analogy to those** which the courts apply to guardians and testamentary trustees,<sup>5</sup> as well as to what the law usually denominates bailees,<sup>6</sup> with, however, essential differences in the character of the office already pointed out.

338. **Election of beneficiary to charge the representative or to accept the investment** instead also applies here as in trusts generally, whenever practicable.<sup>7</sup>

Iowa, 342 (verbal order). And see 87 Md. 284, 39 A. 745; 2 Dem. 14. The court should not make any order which conflicts with the lawful directions of a will. *Hindman v. State*, 61 Md. 471; *post*, 335. Even while pursuing the orders of a court, the representative may incur a personal liability by disregarding the judicial directions. See next c.; 4 Redf. 321; 1 Desau. 128.

<sup>1</sup> *Wms. Exrs.* 1809; *Forbes v. Ross*, 2 Cox, 116; *Gilbert v. Welsh*, 75 Ind. 557. *Smyth v. Burns*, 25 Miss. 422; 20 Barb. 100; 3 Munf. 288; 1 Tenn. Ch. 41; 88 Ind. 1; *Nelson v. Hall*, 5 Jones Eq. 32.

<sup>2</sup> *Malone v. Kelley*, 54 Ala. 532.

<sup>3</sup> See *Lansing v. Lansing*, 45 Barb. 182. Not only may such direction become unsuitable, but a creditor's just demands must be met irrespective of a testator's intentions, however might differ the case of a legatee. *Wms. Exrs.* 1809, 1836; 1 P. *Wms.* 242; 2 Sch. & Lef. 239; 2 Bro. C. C. 117; *McNair's Appeal*, 4 Rawle, 148. A will may control the direction of the executor or administrator in other ways; as by requiring him to invest, where otherwise the fund might have been left idle; or to place money in securities to which he would otherwise not have been confined. See *Shepherd v. Moulds*, 4 Hare, 503; *Nyce's Estate*, 5 W. & S. 254, 40 Am. Dec. 498; 2 Woods, 357. The direction must be prudently construed. *Ib.* And see 5 Dem. 269; 52 A. 814. 24 R. I. 59; *Columbus Ins. Co. v. Humphries*, 64 Miss. 258, 1 So. 232; 39 N. J. Eq. 249. As to the court, see 95 Ga. 707, 22 S. E. 533. Will construed in *Ward v. Kitchen*, 30 N. J. Eq. 31; *Stephens v. Milnor*, 24 N. J. Eq. 358; *Pleasant's Appeal*, 77 Penn. St. 356; *Miller v. Proctor*, 20 Ohio St. 442. There must be no negligent or dishonest performance of such directions. *Wms. Exrs.* 1896.

<sup>4</sup> *Clough v. Bond*, 3 M. & Cr. 496, *per* Lord Cottenham; *Wms. Exrs.* 1820. But as to a deviation of necessity, etc., see generally, *Schoul. Bailm.*, §§ 17, 18.

<sup>5</sup> See *e.g.*, *Perry Trusts*, §§ 452-464; *Schoul. Dom. Rel.* §§ 352-354.

<sup>6</sup> *Supra*, 315.

<sup>7</sup> *Clough v. Bond*, 5 My. & Cr. 496; *Waring v. Lewis*, 53 Ala. 615; *Wms. Exrs.* 1815; *Shepherd v. Moulds*, 4 Hare, 503; *Darling v. Hammer*, 5 C. E. Green, 220. Cf. 1 De G. M. & G. 247.

## CHAPTER IV.

THE REPRESENTATIVE'S POWER TO SELL, TRANSFER, AND  
PURCHASE.

339. Absolute control of the personal assets of the decedent, for purposes of his trust, is vested by law in the executor or administrator, and he has the legal power to dispose of any and all of such property at discretion. This rule, as we have seen, prevails where no statute opposes restraints.<sup>1</sup>

340. But it is only while the representative holds office that his sale or transfer of assets holds good.<sup>2</sup>

341. Assets may be sold either at private or public sale, provided the sale be reasonably prudent and honest.<sup>3</sup>

342. A residue of chattels which are given for life with a remainder over ought to be sold by the executor, if the trust is confided to him; and the interest or money on the invested proceeds of the sale should be paid to the legatee for life, the principal being kept for the remainder-man.<sup>4</sup>

343. The power of the executor to transfer and dispose of a chattel specifically bequeathed, though sometimes questioned, appears on the whole to be well established, as following the general rule of personal assets.<sup>5</sup>

<sup>1</sup> Hence he may exercise a reasonable discretion as to the time when he shall make a transfer of assets, and the manner in which his right of disposition shall be exercised. *Supra*, 322; *Wms. Exrs.* 932-935; *Nugent v. Giffard*, 1 Atk. 463; *Whale v. Booth*, 4 T. R. 625. Statute restraints of a local character must be locally observed. 74 Cal. 536, 5 Am. St. Rep. 466, 16 P. 321; 105 Ill. 32 (as to credit sales); 346, *post*; 4 T. R. 625. Sound judgment and honesty on the representative's part may be presumed by the *bona fide* buyer in such a case; whose title will accordingly prevail against the world. *Scott v. Tyler*, 2 Dick. 725; *Leitch v. Wells*, 48 N. Y. 585.

While purchaser's title may remain good, justification on accounting is needful, so far as the representative is concerned.

<sup>2</sup> *Benson v. Rice*, 2 Nott. & M. 577; 1 Hill (S. C.) Ch. 445; *Soye v. McCallister*, 18 Tex. 80, 67 Am. Dec. 689; *Whorton v. Moragne*, 62 Ala. 201.

<sup>3</sup> *Mead v. Byington*, 10 Vt. 116; *Tyrrell v. Morris*, 1 Dev. & B. Eq. 559; 99 Tenn. 462. An auction or public sale best vindicates the representative's good conduct, where the amount actually realized falls short of the appraised value, and, on the whole, is the safer for him. *McArthur v. Currie*, 32 Ala. 75, 70 Am. Dec. 529; *Gaines v. De la Croix*, 6 Wall. 719; *Weyer v. Second Nat. Bank*, 57 Ind. 198; *Butler v. Butler*, 10 R. I. 501. Cf. local statute, varying the general rule. And see *Lothrop v. Wightman*, 41 Penn. St. 297, 302; 71 Hun (N. Y.), 32. Sale by agent (*e.g.*, broker or auctioneer) is permissible. *Lewis v. Reed*, 11 Ind. 239; 6 La. Ann. 754. See *Kennedy v. Chapin*, 67 Md. 454, 10 A. 243 (limit of agency).

<sup>4</sup> *Jones v. Simmons*, 7 Ired. Eq. 178. See *Sarle v. Court of Probate*, 7 R. I. 270; 479, *post*.

<sup>5</sup> 2 Vern. 444; 2 P. Wms. 149; *Langley v. Lord Oxford*, Ambl. 17; *Wms. Exrs.* 934. But notice affects the purchaser; concurrence of the specific legatee may be desirable. *Garnet v. Macon*, 6 Call. 308.

344. Sales of perishable or wasting assets may be specially desirable.<sup>1</sup>

345. An executor or administrator may dispose of the business of his decedent, including the stock in trade and good will; he may also sell out the stock on hand separately, in the exercise of a reasonable discretion; but he should be heedful how he incurs personal risks by undertaking, without authority, to carry on the trade himself.<sup>2</sup>

346. Local legislation in the United States affects, sometimes, the representative's inherent power over the personal assets as to sale and disposal.<sup>3</sup>

347. The testator's will may also affect by a power of sale clause or by special directions as to disposal.<sup>4</sup>

<sup>1</sup> Public Administrator v. Burdell, 4 Bradf. 252; Harris v. Parker, 41 Ala. 604; *supra*, 327. Local statutes are found.

<sup>2</sup> Roy v. Vilas, 18 Wis. 169; 57 Fed. 774. And see as to carrying on a partnership trade, 325, 326, 376. See further, Merritt v. Dickey, 38 Mich. 41; 60 Miss. 849 (statute restriction); 45 L. T. 183 (equity as to a renewed business lease).

<sup>3</sup> See various local statutes as to judicial direction, license of probate court, etc.; Joslin v. Caughlin, 26 Miss. 134; French v. Currier, 47 N. H. 88; Munteith v. Rahn, 14 Wis. 210; 99 S. W. 959, 30 Ky. Law, 935 (interest-bearing securities); State v. Dickson, 111 S. W. 817, 213 Mo. 66 (imperative); Green, *Re*, 37 N. J. Eq. 254; Whorton v. Moragne, 62 Ala. 201. The general right of the representative to sell may not be essentially altered by such legislation, but rather aided. The sale of outstanding debts and claims may be thus sanctioned to facilitate settling the estate. See 14 La. Ann. 677. So, too, where peculiar delays attend the settlement of the estate, such as might arise, for instance, where the rights of those claiming to be legatees or distributees were in litigation. Crawford v. Blackburn, 19 Md. 40. And see 17 Cal. 339; 10 R. I. 501; Spears (S. C.) Ch. 289, 40 Am. Dec. 618. The purchaser should see that the representative makes his sale according to the statute or judicial order. 12 Ala. 305. Mere irregularities in pursuing an order of sale are sometimes cured by the court's confirmation of the sale. Jacob's Appeal, 23 Penn. St. 477. Some statute formalities may be merely directory and not imperative. Martin v. McConnell, 29 Ga. 204. And see Robbins v. Wolcott, 27 Conn. 234. As to a sale made under a void judicial order, see Beene v. Collenberger, 38 Ala. 647; Michel, Succession of, 20 La. Ann. 233. The purchaser at the representative's sale should on discovery of irregularities elect promptly whether to repudiate the transaction or not, and act consistently with his election. Joslin v. Caughlin, 30 Miss. 502.

Personal property of the deceased, notwithstanding such permissive statutes, is commonly sold by executors or administrators, at their own discretion, without any such order of court; and, if the representative acts in good faith and sound discretion, the interests of no person concerned can be injuriously affected. Harth v. Heddestone, 2 Bay (S. C.) 321; Mead v. Byington, 10 Vt. 116; Sherman v. Willett, 42 N. Y. 146. If executor or administrator complies with the judicial order his responsibility for what the sale realizes is limited. Munteith v. Rahn, 14 Wis. 210.

<sup>4</sup> Smyth v. Taylor, 21 Ill. 296; Dugan v. Hollins, 11 Md. 41; Durham, Estate of, 49 Cal. 491; Evans v. Evans, 1 Desau. 515. Cf. Tyrrell v. Morris, 1 Dev. & B. Eq. 559. See McCollum v. McCollum, 33 Ala. 711. And see 1 De G. M. & G. 635; Green, *Re* 37 N. J. Eq. 254; Willis v. Sharpe, 113 N. Y. 586 (authority also to pledge, mortgage, purchase, etc.).

Powers under a will should be construed according to their true intentment.

348. The judgment of residuary legatees or distributees may be of importance in aiding the representative's discretion as to the time, place, and manner of sale in a case of delicacy.<sup>1</sup>

349. The representative of a decedent may mortgage or pledge the personal assets, or part of them, as well as alienate, unless specially restrained by statute or the will; the general presumption being that one does so, as he well might, in the course of a prudent administration.<sup>2</sup>

350. As a general principle, it is not incumbent on either a purchaser or a transferee upon security, to see that the money he pays or advances is properly applied, although he knew he was dealing with an executor or administrator; and simply because the executor or administrator may be presumed to exercise properly his large discretion to dispose of personalty belonging to the estate.<sup>3</sup>

351. Letters of administration or letters testamentary are commonly regarded as sufficient evidence of authority to transfer stock or registered bonds, or assign and collect bank deposits and other incorporeal personalty; because all such transfers, assignments, or collections are within the line of an executor's or administrator's duty.<sup>4</sup>

352. But good faith and caution are requisite from a transferee in dealing with a personal representative. "*Bona fide* third party without notice" is the usual expression.<sup>5</sup>

<sup>1</sup> That is, of the parties in interest. 25 W. R. 522; 332; Geyer v. Snyder, 140 N. Y. 394, 35 N. E. 784. But this is not essential.

<sup>2</sup> Scott v. Tyler, 2 Dick. 712; Wms. Exrs. 934; 7 Ves. 152; Vane v. Rigdon, L. R. 5 Ch. 663; 17 Ves. 154; Shaw v. Spencer, 100 Mass. 392, 97 Am. Dec. 107; Carter v. Manufacturers' Bank, 71 Me. 448, 36 Am. Rep. 338; Smith v. Ayer, 101 U. S. 320, 25 L. Ed. 955; Wood's Appeal, 92 Penn. St. 379, 37 Am. Rep. 694; Goodwin v. American Bank, 48 Conn. 550. Cf. 1 Freem. (Miss.) Ch. 42. And if the will confers ample powers, all the more surely is his discretion to be respected. See 347.

<sup>3</sup> Hill v. Simpson, 7 Ves. 152; Field v. Schieffelin, 7 Johns. Ch. 150, 11 Am. Dec. 441; 2 Dick. 725; 17 Ves. 154; 13 Pick. 393; 10 Penn. St. 265. 100 Mass. 392, 97 Am. Dec. 107; Jones v. Clark, 25 Gratt. 642. So as to a sale under license of court. See 346; 2 Strobb. Eq. 134; 4 Rand. 566. Such authority is more ample, presumably, than that of a mere trustee. *Ib.*; Duncan v. Jaudon, 15 Wall. 165; Bayard v. Farmers' Bank, 52 Penn. St. 232. But see the conservative expression of Smith v. Ayer, 101 U. S. 320, 25 L. Ed. 955. As to notice of an intended misapplication, see 352, *post*. Hence, the equities of a *bona fide* transferee, without due notice of a fraud upon the estate, are respected; though this does not by intentment enlarge the legal powers of the representative, nor give a colorable sanction to misconduct on his part.

<sup>4</sup> Bayard v. Farmers' Bank, 52 Penn. St. 232. Cf. 350 as to trustees.

<sup>5</sup> Wherever, therefore, the purchaser, pledgee, mortgagee, or other transferee, takes assets and accepts their transfer, for what one may reasonably suppose is outside the scope of the representative authority, he is bound to look into that authority or he will act at his peril. Smith v. Ayer, 101 U. S. 327, 25 L. Ed. 955; Gottberg v. U. S. Bank, 131 N. Y. 595, 30 N. E. 41. Not improper collusion alone, but notice of misapplication

353. **Leases being chattels real or personal assets**, the representative's right to assign and dispose absolutely of them is also recognized; subject, of course, to the usual restrictions imposed upon his power to alienate.<sup>1</sup>

354. **As concerns more particularly the responsibility of the representative himself and the liability of sureties** on his bond, the rule is that he must not sell, pledge, or otherwise transfer personal property belonging to the estate, except it be in the exercise of good faith and reasonable<sup>2</sup> prudence, for the benefit of the estate and without perversion of the assets to other purposes.<sup>3</sup>

355. **For the consequences of his own fraud, in connection with a transfer, one is unquestionably answerable**, on the usual prin-

involves the transferee as a participator in the fraud; and where one has reasonable grounds for believing that the executor or administrator intends to misapply such assets or their proceeds, or is in the very transaction converting them to private uses, such party can take no advantage from the transaction, and the title he has acquired cannot be upheld. *Ib.*; *McLeod v. Drummond*, 17 Ves. 153; 7 De G. M. & G. 633; *Hutchins v. State Bank*, 12 Met. 423; 7 Johns. Ch. 150, 11 Am. Dec. 441; *Miller v. Williamson*, 5 Md. 219; *Yerger v. Jones*, 16 How. 30, 14 L. Ed. 832; *Taney C. C.* 310; *Graff v. Castleman*, 5 Rand. 195.

See as to selling or pledging assets for one's private debt, *Carter v. Manufacturers' Bank*, 71 Me. 448, 36 Am. Rep. 338; *Scott v. Searles*, 15 Miss. 498, 45 Am. Dec. 317; 6 Humph. 158; *Wms. Exrs.* 937; 43 So. 226; *Chandler v. Schoonover*, 14 Ind. 324. A purchase of the testator's effects at a nominal price, or a fraudulent undervalue, in collusion with the representative, renders the purchaser liable for the full value; or, at the option of those interested, the transfer may be set aside. *Rice v. Gordon*, 11 Beav. 265; *Wms. Exrs.* 936; 11 Barb. 15. And see as to other objects, hostile to the interests of the estate, *Smith v. Ayer*, 101 U. S. 320, 95 L. Ed. 955; *Trull v. Trull*, 13 Allen, 407; 7 Ired. Eq. 231; 10 Yerg. 394. Cf. as to insufficient notice of misapplication intent, *Carter v. Manufacturers' Bank*, 71 Me. 448, 36 Am. Rep. 338; *Goodwin v. American Bank*, 48 Conn. 550; *Wood's Appeal*, 92 Penn. St. 379, 37 Am. Rep. 694 (commercial usage). And see 362, *post*.

Purchaser's title under sale not affected by discovery and probate of a later will. *Ellis v. Davis*, 109 U. S. 485, 27 L. Ed. 1006; 27 Ch. D. 220.

<sup>1</sup> *Wms. Exrs.* 939; *Taylor Landl. & Ten.* § 133; *supra*, 223; *Drohan v. Drohan*, 1 B. & B. 185; *Keating v. Keating*, 1 Lloyd & G. 133. This power to assign or underlet is, however, frequently restrained or excluded in modern times by the original terms of a lease, so that the lessor's consent is made a prerequisite; in which case a question of construction may arise. *Wms. Exrs.* 940-943; 2 T. R. 425; 25 Taunt. 259.

The executor or administrator, in whom leaseholds become vested, should ordinarily sell and assign and let the assignee take the risks as to the value of his purchase. As to an underlease, see *Wms. Exrs.* 939; *Ricketts v. Lewis*, 20 Ch. D. 745; 29 W. R. 113. The proceeds of an absolute disposition of the lease, or the rents accruing from an underlease, become assets of the estate in the personal representative's hands. *Wms. Exrs.* 939; 2 W. Bl. 692; *Bank v. Dudley*, 2 Pet. 492, 7 L. Ed. 496; *Boxall v. Boxall*, 27 Ch. D. 220.

<sup>2</sup> Or "ordinary," according to the American rule. 315, *supra*.

<sup>3</sup> Though wrongful or imprudent transfer may pass a good title to the transferee, it cannot exonerate the representative who has made it from direct responsibility, as an officer subject to removal, whose bond may be prosecuted and whose accounts are passed upon. See 48 A. 815, 19 Penn. 591; 1 Mo. 749; *Baines v. McGee*, 9 Miss. 208; *Mead v. Byington*, 10 Vt. 116; *Sherman v. Willett*, 42 N. Y. 146; 13 Allen. 407.

ciples, to the innocent parties injured thereby.<sup>1</sup> The time and method and terms chosen by the representative for making a sale and disposing of particular assets should be reasonable under all the circumstances;<sup>2</sup> and if the representative act under judicial or testamentary directions, he must comply with them.<sup>3</sup>

356. In procuring payment or taking or enforcing security for the purchase-money, the same doctrine applies of personal liability. Judicial directions enforce prudence.<sup>4</sup> Any sale of assets made on credit, and without taking security of some sort from the purchaser, can rarely be considered a prudent transaction on the part of a fiduciary, so as to exempt him from the risk of subsequent loss.<sup>5</sup>

357. Where an executor or administrator collusively sells personal property of his decedent at an undervalue, when he might have obtained a higher price, or so as to lose the price altogether, it is a *devastavit*, and he shall answer for the real value.<sup>6</sup>

<sup>1</sup> *Skrine v. Simmons*, 11 Ga. 401; 1 A. K. Marsh. 442; *Harrington v. Brown*, 5 Pick 519; *Miles v. Wheeler*, 43 Ill. 123; *Woods v. North*, 6 Humph. 309, 44 Am. Dec. 312.

<sup>2</sup> *Griswold v. Chandler*, 5 N. H. 492; *Marsden v. Kent*, 25 W. R. 522; 11 Md. 41; 3 Bradf. 199; *Mead v. Byington*, 10 Vt. 116; *Stewart v. Stewart*, 31 Ala. 207.

<sup>3</sup> 4 Redf. 321. If the representative fails in his duty in these or other respects, he may be held to account for the property on the basis of the inventory value, or perhaps the actual loss to the estate. *Griswold v. Chandler*, 5 N. H. 492; *Pinckard v. Woods*, 8 Gratt. 140. A failure to sell and dispose of personal assets does not necessarily impute carelessness to the executor or administrator, but the circumstances should be considered. *McRae v. McRae*, 3 Bradf. 199. And see as to foreign market, 2 Hill (S. C.) Ch. 261.

<sup>4</sup> *Hasbrouck v. Hasbrouck*, 27 N. Y. 182; *Vreeland v. Vreeland*, 13 N. J. L. 512; 1 Cheves, 181; 2 Stew. & P. 373; *Davis v. Marcum*, 4 Jones Eq. 189; *Peay v. Fleming*, 2 Hill Ch. 97; *Southall v. Taylor*, 14 Gratt. 269. Cf. *Gwynn v. Dorsey*, 4 Gill & J. 453.

<sup>5</sup> *Orcutt v. Orms*, 3 Paige, 459; *Stukes v. Collins*, Desau. 207; 56 S. E. 504, 61 W. Va. 287; *Chandler v. Schoonover*, 14 Ind. 324; *Dillabaugh's Estate*, 4 Watts, 177; *English v. Horn*, 102 Ga. 770, 29 S. E. 972; 2 Murph. 384. In pursuing the security taken or attempting to recover property transferred, or collecting cash, one may be culpably negligent, or the reverse. *Johnston's Estate*, 9 W. & S. 107; 323, *supra*. Security or deposit taken in connection with a transfer of the assets, by the representative, enures properly to the benefit of the estate. *Pulliam v. Winston*, 5 Leigh, 324; *Spears*, Ch. 357. And see *Stewart v. Stewart*, 31 Ala. 207; *Gwynn v. Dorsey*, 4 Gill & J. 453; 57 Cal. 407.

<sup>6</sup> *Skrine v. Simmons*, 11 Ga. 401; *Heath v. Allin*, 1 A. K. Marsh. 442; *Mountcastle v. Mills*, 11 Heisk. 267 (re-sale). So as to the fraudulent pledge or mortgage of assets. *Supra*, 352 (substance of transaction considered).

Where there is any collusive and fraudulent dealing with the personal assets of an estate, or a misappropriation, not only a creditor, but a legatee, whether general or specific, or a distributee, is entitled to follow the assets in equity. *Hill v. Simpson*, 7 Ves. 152; 1 My. & K. 337; *Flanders v. Flanders*, 23 Ga. 249, 68 Am. Dec. 523. But within a reasonable time. *Wms. Exrs.* 938; *Elliott v. Merriman*, 2 Atk. 41; 14 Ves. 353; 17 Ves. 152; *Flanders v. Flanders*, 23 Ga. 249, 68 Am. Dec. 523. In our probate practice, where bonds are given by the fiduciary, other facilities are found. See *Mawhorter v. Armstrong*, 16 Ohio, 188; *Hart v. Hart*, 39 Miss. 221, 77 Am. Dec. 668.

358. The purchase by a representative at his own sale was formerly unlawful.<sup>1</sup> But the preponderance of American decisions tends rather to the conclusion that advantage to the estate is the main thing to be considered. They hold that, at all events, a purchase by the representative is not absolutely void, but voidable only by persons interested in the estate at their option;<sup>2</sup> nor even by these if they have directly sanctioned or presumably acquiesced in the transaction.<sup>3</sup>

359. If an executor or administrator sells, mortgages, or pledges any of the personal property of his decedent's estate in perversion of his trust,<sup>4</sup> every person who receives any part of this property, as a participator with notice in the representative's breach of trust, is, generally speaking, responsible; and the assets wrongfully transferred or disposed of may be reached by creditors, legatees, and distributees or heirs. The relief afforded for the fraud and damage

<sup>1</sup> *Hall v. Hallett*, 1 Cox, 134; *Watson v. Toone*, 6 Madd. 153; *Wms. Exrs.* 938; 113 N. C. 270; *Miles v. Wheeler*, 43 Ill. 123; 5 Dana, 398; *Sheldon v. Rice*, 30 Mich. 296, 18 Am. Rep. 136.

<sup>2</sup> 5 Pick. 519; *Mercer v. Newson*, 23 Ga. 151; 2 Hen. & M. 245; 6 Ala. 894; *Mead v. Byington*, 10 Vt. 116; *Ives v. Ashley*, 97 Mass. 198; *Gilbert's Appeal*, 78 Penn. St. 266; 5 Johns. 43; *Moses v. Moses*, 50 Ga. 9; *Staples v. Staples*, 24 Gratt. 225; 57 Fed. 873. And see *Sheldon v. Rice*, 30 Mich. 296, 18 Am. Rep. 136; *Monroe's Estate*, 142 N. Y. 484, 37 N. E. 517.

<sup>3</sup> *Williams v. Marshall*, 4 Gill. & J. 376; *Lyon v. Lyon*, 8 Ired. 201; *Todd v. Moore*, 1 Leigh, 457; 23 Ga. 249, 68 Am. Dec. 523; *Miller v. Binion*, 33 Ga. 33; *Dunlap v. Mitchell*, 10 Ohio, 117; 159 Mass. 185, 34 N. E. 181; 41 Penn. St. 297. And see as to taking and accounting for assets at appraised value, 5 Dana, 398; 1 Desau. 150.

A purchase by the representative at his own sale must, however, in order to stand assault, be in the true interest of the estate. 2 Root (Conn.) 473; *McCartney v. Calhoun*, 17 Ala. 301; *Lyon v. Lyon*, 8 Ired. L. 201; 4 Hen. & M. 430; 2 Blackf. 377, 20 Am. Dec. 123; *Griswold v. Chandler*, 5 N. H. 492. The true valuation of the property should be considered. *Dudley v. Sanborn*, 159 Mass. 185, 34 N. E. 181; *Raines v. Raines*, 51 Ala. 237; *Moffat v. Loughridge*, 51 Miss. 211; *Gilbert's Appeal*, 78 Penn. St. 266. While such transactions may not be positively illegal, they justify and require a close scrutiny into the good faith and fairness of the transaction; being liable to gross abuses, like the purchase of an attorney from his client or a guardian from his late ward. *Moses v. Moses*, 50 Ga. 9. And see *Goodwin v. Goodwin*, 48 Ind. 584 (buying in legacies). See further, *Julian v. Reynolds*, 8 Ala. 680; *Whitley v. Alexander*, 73 N. C. 444; *Cannon v. Jenkins*, 1 Dev. Eq. 422. As to unfair or dishonest appropriations of assets, see *Holland v. Ball*, 78 N. E. 772, 193 Mass. 80; 105 N. Y. S. 857; *State v. Culhane*, 63 A. 636, 78 Conn. 622; *Locher's Estate*, 67 A. 954, 219 Penn. 46 (exchange instead of sale).

In fine, according to authorities, a purchase of personalty by the executor or administrator at his own sale, either directly or indirectly, will, though not absolutely void, be set aside, upon the timely application of any party interested in the estate; and this rule is of general application to sales of trust property. *Bennett, Ex parte*, 10 Ves. 381; *Davone v. Fanning*, 2 Johns. Ch. 253; *Booraem v. Wells*, 19 N. J. Eq. 87; *Lytle v. Beveridge*, 58 N. Y. 593. Local statutes prohibiting such purchases are found. 84 Mo. 561. As to ancillary representative, see *Clark v. Blackington*, 110 Mass. 369. At the same time, the election of the interested parties may confirm the sale.

<sup>4</sup> As e.g., in payment of or as security for his personal debt.

appears to be an equitable one at their election; no adequate or complete remedy existing at law, or none, at all events, where the representative and his sureties are worthless.<sup>1</sup>

360. **But the representative cannot usually avoid his own sale or pledge, though guilty of a breach of trust in making it.** It may be needful and proper to remove him from the trust and appoint another; but such a removal is not for the purpose of reaching the assets themselves, but preparatory rather to holding the delinquent representative to account, and suing him and his bondsmen for maladministration.<sup>2</sup>

361. **Jurisdiction in the premises, regular procedure by virtue of his office,** is what an executor or administrator warrants by implication in his sale or transfer.<sup>3</sup> But there is here no implied warranty of the title; and the purchaser or transferee acquires only the decedent's rights in the property, subject to his incumbrances; so that, in the absence of fraud or an express warranty on the representative's part, there is no remedy to the buyer or transferee should the title utterly fail.<sup>4</sup>

<sup>1</sup> *McLeod v. Drummond*, 17 Ves. 153; 4 *Brown*, C. C. 127, 139; 2 *Mason*, 271; 5 *Johns*, Ch. 297, 9 Am. Dec. 298; *Riddle v. Mandeville*, 5 Cranch, 322; *Field v. Schieffelin*, 7 *Johns*, Ch. 150, 11 Am. Dec. 441; 2 *Rand*, 294; 3 *Littell*, 180. And see *supra*, 297.

<sup>2</sup> As to avoidance by the successor *de bonis non*, see c. 6, *post*. But where the representative may correct his own error or wrong he should do so and pursue the third parties for the benefit of the estate. *Zimmerman v. Kinkle*, 108 N. Y. 282, 15 N. E. 407.

<sup>3</sup> *Woods v. North*, 6 *Humph*. 309; *Beene v. Collenberger*, 38 *Ala.* 647; *Michel's Succession*, 20 *La. Ann.* 233.

<sup>4</sup> *Cagar v. Frisby*, 36 *Miss.* 178; *Stanbrough v. Evans*, 2 *La. Ann.* 474. But see 9 *La. Ann.* 232. Where, however, the purchase-money remains in the representative's hands still undistributed, it seems equitable and just, as some cases affirm, that he should refund to the purchaser in such a case. *Mockbee v. Gardner*, 2 *Har. & G.* 176. Or, if the money has not yet been paid, to relieve the purchaser of the bargain. See *Williamson v. Walker*, 24 *Ga.* 257, 71 Am. Dec. 119; 9 *Tex.* 285. In respect of warranty executors, administrators, and other trustees constitute exceptions to the familiar rule that there exists in every sale of personal property an implied warranty of title. See 2 *Schoul. Pers. Prop.* § 320 *et seq.*; *Chapman v. Speller*, 14 *Q. B.* 621; *Blood v. French*, 9 *Gray*, 197; *Brigham v. Maxley*, 15 *Ill.* 295; *Bartholomew v. Warner*, 32 *Conn.* 98, 85 Am. Dec. 251. The reason for this exemption from personal responsibility is derived from the peculiar nature of the office held by the representative or trustee. But even here, if fraud taints the transaction, or if there has been an express warranty and eviction, the representative makes himself personally liable to the purchaser for the consequences. *Mockbee v. Gardner*, 2 *Har. & G.* 176; *Sumner v. Williams*, 8 *Mass.* 162, 5 Am. Dec. 83; *Buckels v. Cunningham*, 14 *Miss.* 358; *Able v. Chandler*, 12 *Tex.* 88, 62 Am. Dec. 518; *Newell v. Clapp*, 97 *Wis.* 104, 72 N. W. 366. It becomes a question, therefore, whether an express warranty which the representative makes, outside the usual scope of his official authority, binds the estate and not himself alone. See *Craddock v. Stewart*, 6 *Ala.* 77, 80; *Boltwood v. Miller*, 112 *Mich.* 657, 71 N. W. 506. But local statutes may regulate this whole matter. If the representative seeks, by giving express warranty, to make a better sale for the estate, he may well secure himself by getting distributees or others in interest to obligate themselves personally in return; or they may themselves undertake to make express warranty to the pur-



362. **An executor or administrator may sell or otherwise transfer promissory notes, bills of exchange, or other negotiable instruments belonging to the decedent's estate, as well as corporeal chattels.**<sup>1</sup> Should the representative dispose improperly of such assets and the rights thereunder, he may be rendered liable on his bond; yet this will not affect the title of an indorsee, assignee, or other transferee who takes the instrument when not overdue in presumable good faith and for value, without notice of infirmity shown.<sup>2</sup>

363. **The power of an executor or administrator to purchase follows the general doctrine** of his authority to sell, invest, and re-invest.<sup>3</sup> An unauthorized purchase is voidable at the election of those in interest; and under the circumstances presented in some particular transaction, it may be matter of inquiry whether the purchase made by a representative was on his individual account or for the use of the estate.<sup>4</sup>

chaser. See *Kelso v. Vance*, 58 Tenn. 334. Each purchaser, otherwise, being put on his own guard in such transactions, should inquire into the title for himself, or offer a less price in consideration of the risk he runs.

<sup>1</sup> *Rawlinson v. Stone*, 3 Wils. 1; *Wms. Exrs.* 943; *Gray v. Armistead*, 6 Ired. Eq. 74; *Rand v. Hubbard*, 4 Met. 258; *Cleveland v. Harrison*, 15 Wis. 670; *Nelson v. Stollenwerck*, 60 Ala. 140.

<sup>2</sup> *Gray v. Armistead*, 6 Ired. Eq. 74. See *Munteith v. Rahn*, 14 Wis. 210; 357, *supra*; *Hough v. Bailey*, 32 Conn. 288; *Wilson v. Doster*, 7 Ired. Eq. 231; *Walker v. Craig*, 18 Ill. 116; *Speelman v. Culbertson*, 15 Ind. 441; *Burbank v. Payne*, 17 La. Ann. 15. 87 Am. Dec. 513. But as to notice of infirmity, see *Lutham v. Moore*, 6 Jones Eq. 167; *Scranton v. Farmers' Bank*, 24 N. Y. 424; *Scott v. Searles*, 15 Miss. 498, 45 Am. Dec. 317; *Smarrt v. Waterhouse*, 6 Humph. 158; 2 Md. Ch. 94; *supra*, 352. Negotiable paper is favored in this respect as to the holder. 7 Ired. Eq. 73; *Rogers v. Zook*, 86 Ind. 237.

The representative may, by indorsement or the other usual means, guarantee payment of the instrument he transfers; but by doing so he binds himself personally, and not the estate. *Robinson v. Lane*, 22 Miss. 161; *Wms. Exrs.* 943. See *Bromage v. Lloyd*, 1 Ex. 32. And see 37 Miss. 526. Consequently the form of assigning or indorsing should, as a rule, be so prudently expressed that no recourse can be had either against him or the estate he administers upon. *Ely v. Williams*, 13 Wis. 1; *Grafton Bank v. Wing*, 52 N. E. 1067, 172 Mass. 513, 70 Am. St. Rep. 303, 43 L. R. A. 831; 17 Kan. 81.

As to instruments assignable in blank under commercial usage, or *quasi* negotiable, see *Wood's Appeal*, 92 Penn. St. 379, 37 Am. Rep. 694; 352.

As the representative may sell and dispose of a negotiable instrument belonging to the estate, so may he dispose of it with pledge or mortgage security accompanying it, and assign and transfer accordingly. *Ely v. Williams*, 13 Wis. 1. See 127 Mass. 174. And see as to real estate mortgage note, *Cleveland v. Harrison*, 15 Wis. 670; *Jelke v. Golsmith*, 52 Ohio St. 499, 49 Am. St. Rep. 730, 40 N. E. 167; *Miller v. Henderson*, 10 N. J. Eq. 320; *supra*, 214. An executor or administrator may, under circumstances of due prudence and good faith, sell a negotiable instrument or other incorporeal *chase* at a price below the nominal amount, as he certainly may for a price above it. *Wheeler v. Wheeler*, 9 Cow. 34; *Gray v. Armistead*, 6 Ired. Eq. 74; 55 Miss. 278; 57 Ga. 232. And see *Latta v. Miller*, 109 Ind. 302, 10 N. E. 100.

<sup>3</sup> See *supra*, 322, 358.

<sup>4</sup> *Colvin v. Owens*, 22 Ala. 782; *Harper v. Archer*, 28 Miss. 212. If the representative misapplies funds of the estate in a purchase, fraudulently or unreasonably, he may be held accountable on his bond for the misapplication; and where the seller was

364. **The executor or administrator has no inherent right to give away assets of the estate, even though he should deem them worthless.**<sup>1</sup>

cognizant of his breach of trust, those interested in the estate and injured thereby may bring a bill in equity to compel the seller to refund the purchase-money and place them *in statu quo*. *Trull v. Trull*, 13 Allen, 407; *supra*, 352. See *Cousins, Re*, 30 Ch. D. 203 (option to purchase personal to a testator); *Willis v. Sharpe*, 113 N. Y. 586, 4 L. R. A. 593, 21 N. E. 705 (power under the will). And see *Lovell v. Field*, 5 Vt. 218; 118 N. C. 440, 24 S. E. 774 (liable under his own contract, whether estate is bound or not).

<sup>1</sup> *Radovich's Estate*, 74 Cal. 536, 5 Am. St. Rep. 436, 16 P. 321. But *aliter*, as to gifts authorized by will, etc., or transferring assets upon a fair settlement.

## CHAPTER V.

## LIABILITY OF AN EXECUTOR OR ADMINISTRATOR.

**365. The liability of an executor or administrator may accrue** (1) in respect of the acts of the deceased; or (2) in respect of his own acts. These two subjects will be considered separately.

**366. (1) As to liability in respect of the acts of the deceased.** Causes of action which are founded in any contract, duty, or obligation of the decedent, and upon which the decedent himself might have been sued during his lifetime, will survive so as to continue enforceable against his estate.<sup>1</sup>

**366a. In case of an incomplete delivery under the sale or bargain of the decedent,** his representative ought to complete the delivery and carry out the contract.<sup>2</sup> Liability or nonliability in such matters should, as to the decedent, follow the usual rules.<sup>3</sup>

**367. But exception arises in favor of personal contracts of the deceased,** and here, unless the contract expressly provides differently (as in some instances it may), death necessarily severs the relation and puts an end to the legal obligation which has, without fault of the contractor, become impossible of performance.<sup>4</sup> Where the

<sup>1</sup> Wms. Exrs. 1721; *Atkins v. Kinnan*, 20 Wend. 241, 32 Am. Dec. 534. But void contracts of the decedent should be disregarded. 62 Mich. 349, 4 Am. St. Rep. 867, 28 N. W. 892. The principle of survival of actions against corresponds to that of survival in favor. See 277, *supra*. Consequently, the executor or administrator is legally answerable, so far as the assets in his hands may enable him to respond, for debts of every description which were owing by the deceased, whether debts of record, such as judgments or recognizances; debts due on special contract, as for rent in arrears or on bonds, covenants, and other sealed contracts; or debts by simple contract, such as bills and notes, and promises expressed orally or in writing. *Smith v. Chapman*, 93 U. S. 41, 23 L. Ed. 795; *Harrison v. Vreeland*, 38 N. J. L. 366. And see Am. Dig. (1897-06) §§ 429, 430. And usually the defences to a suit open to his decedent are open to him also. *E.g.* coverture, 108 N. C. 218, 13 S. E. 2. Or limitations. See 18 Q. B. D. 250.

Even where the cause of action sounds in damages, as for negligent performance, the action will survive against the representative. 2 B. & B. 102; *Cowp.* 375; *Alton v. Midland R.*, 19 C. B. N. s. 242; Wms. Exrs. 799, 1722; 3 Stark. N. P. 154. Cf. *Miller v. Wilson*, 24 Penn. St. 114; *Long v. Morrison*, 14 Ind. 595, 77 Am. Dec. 72. And see *Bradbury v. Morgan*, 1 H. & C. 249; 2 Mod. 268; 1 C. B. 402. Assets of an estate go first towards discharging all lawful claims and demands against the deceased which may be outstanding at his death. See Part V, *post*.

<sup>2</sup> *Parker v. Barlow*, 93 Ga. 700, 21 S. E. 213.

<sup>3</sup> See 146 Penn. St. 63, 23 A. 322.

<sup>4</sup> In such instances the estate of the decedent is relieved of all further liability under the contract. *Cro. Eliz.* 533; 1 M. & W. 423; *Robinson v. Davison*, L. R. 6 Ex. 269; *Smith v. Wilmington Coal Co.* 83, Ill. 498; Wms. Exrs. 1725; *Bland v. Umstead*, 23 Penn. St. 316. For the same distinction as to rights of decedent, see 278, *supra*. *E.g.*, a contract to support a parent. *Siler v. Gray*, 86 N. C. 566. And see 2 W. Bl.

contract between the parties was expressed in writing, the language, scope, and intendment of the instrument must be considered in instances like these.<sup>1</sup>

368. **Gifts are here to be distinguished from contracts** as to their binding force. Gifts to take effect after death stand upon the footing of legacies or gifts *causa mortis*, and if valid at all, must be referred to the peculiar rules which apply thereto.<sup>2</sup> In other words any contract of the decedent unexecuted must have a sufficient legal consideration in order that one may sue his executor or administrator upon it.<sup>3</sup>

369. **The form of action appears sometimes material in connection with suits against the representative** touching the obligation of the decedent.<sup>4</sup> Specific performance in equity will rarely lie on the unexecuted contracts of a decedent relating to personalty, since the remedy at law for damages is usually adequate and certain.<sup>5</sup>

370. **Where the cause of action against the decedent was founded in tort, and not contract,** the right of action to recover damages died at common law with the person who committed the wrong.<sup>6</sup> Con-

856. So as to contracts usually for hired service, authorship, etc. But the line of judicial interpretation sometimes runs closely because of peculiar terms of contract. Cf. *Wentworth v. Cock*, 10 Ad. & E. 45; *Dickenson v. Callahan*, 19 Penn. St. 227; 1 H. & C. 249 (a guaranty). Though, for any breach of such a contract committed during the decedent's lifetime, the executor or administrator must of course respond out of the assets, as in other cases. Act of God preventing or terminating the performance of a personal contract, is always held to excuse it; and even sickness or disability may justify its breach during one's life. Schoul. Dom. Rel. § 474. The personal nature of a contract applies with similar force and reciprocally as between those who have occupied the relation of master and servant, or principal and agent. *Tasker v. Shepherd*, 6 H. & N. 575; 7 Taunt. 580; *Campanari v. Woodburn*, 15 C. B. 400; Wms. Exrs. 1727. The rule of apportionment, custom, statute, or express contract, all seek to mitigate, however, any harsh consequence of such a doctrine.

<sup>1</sup> See *Smith v. Preston*, 170 Ill. 179, 48 N. E. 688; *Oliver v. Rumford Works*, 109 U. S. 81, 27 L. Ed. 862; *Chamberlain v. Dunlop*, 126 N. Y. 45, 52, 22 Am. St. Rep. 807, 26 N. E. 966. As to leases and their covenants (which are rarely personal), see 1 C. B. 402; 375, *post*.

<sup>2</sup> See Part V, as to legacies; *supra*, 219. Hence, an act of pure bounty, not fully performed by the decedent during his lifetime, cannot be specifically enforced against the estate or its representative. 1 Swanst. 485; *Callaghan v. Callaghan*, 8 Cl. & Fin. 374; 4 My. & Cr. 637; *Shurtleff v. Francis*, 118 Mass. 154; 1 Allen, 175; Wms. Exrs. 1768; 7 Taunt. 580; *Bell v. Hewitt*, 24 Ind. 280. Expectation merely of a legacy for service is to be here distinguished from a decedent's promise of a legacy for service. Mere writing under seal raises here no consideration. *Baxter v. Gray*, 3 M. & G. 771; 1 Esp. 188; *Nield v. Smith*, 14 Ves. 491.. And see Book I, 453.

<sup>3</sup> As to gifts generally, see 2 Schoul. Pers. Prop. §§ 54-125.

<sup>4</sup> See Wms. Exrs. 1930, 1931; 5 Bing. 206; stat. 3 & 4 Wm. IV, c. 42. And see *Thompson v. French*, 10 Yerg. 452. As to revival, see local statute; *Segars v. Segars*, 76 Me. 96; 62 Miss. 19; *Holsman v. St. John*, 90 N. Y. 461. And see 91 N. C. 495.

<sup>5</sup> *Beekman v. Cottrell*, 51 N. J. Eq. 337, 31 A. 29.

<sup>6</sup> See *supra*, 279-283, for corresponding rule where decedent was the party wronged.

sequently, wherever an injury had been done to the person or property of another for which damages only could be recovered as for one's wilful misconduct or negligence, the death of the wrongdoer before judgment precluded legal redress.<sup>1</sup> But if judgment had been recovered against the person committing the wrong, during his life, the judgment debt would have bound the estate; the judgment itself creating a new and distinct obligation of the contract kind.<sup>2</sup>

371. In replevin, if the plaintiff died, the cause of action appears to have survived at the common law; but, if the defendant died, the right of action against him died also.<sup>3</sup>

372. While actions declaring as for a tort committed by the defendant were thus defeated or abated by such party's death, other remedies against his estate might sometimes avail for the injured person's redress, provided the form of declaration were different.<sup>4</sup>

373. But modern legislation, both in England and the United States, favors an enlargement of the causes where survival shall be

<sup>1</sup> Thus, one's executor or administrator could not be sued for false imprisonment, assault and battery, slander, libel, malicious prosecution, or any other personal injury inflicted by the decedent, whether mental or physical. *Wms. Exrs.* 1728; *Waters v. Nettleton*, 5 Cush. 544; 65 Barb. 338; 87 N. C. 351. Nor for trespass, trover, or deceit; nor for causing damage by a nuisance diverting a water-course, or obstructing lights. 7 Mass. 395; 1 Bibb, 246; *Nicholson v. Elton*, 13 S. & R. 415; *Jarvis v. Rogers*, 15 Mass. 398. Cf. *Duncan, Re*, (1899) 1 Ch. 387. Nor for default and embezzlement. *Franklin v. Low*, 1 Johns. 396; *Schreiber v. Sharpless*, 110 U. S. 76, 28 L. Ed. 65. Nor for some penal offence. *Stokes v. Stickney*, 96 N. Y. 323; 103 N. Y. 477, 9 N. E. 605; *Ld. Raym.* 973; *Lynn v. Sisk*, 9 B. Monr. 135; *Carrollton v. Rhomberg*, 78 Mo. 547; *Diversey v. Smith*, 103 Ill. 378, 42 Am. Rep. 14. Malpractice suits do not survive the defendant. *Jenkins v. French*, 58 N. H. 532; *Boor v. Lowrey*, 103 Ind. 468, 53 Am. Rep. 519, 3 N. E. 151. Nor an action for breach of promise of marriage except for special damage to property. *Finlay v. Chirney*, 20 Q. B. D. 494; *Shuler v. Millsaps*, 71 N. C. 297; *Chase v. Fitz*, 132 Mass. 359. Divorce suits abate by a defendant's death. *McCurley v. McCurley*, 80 Md. 185, 45 Am. Rep. 717. And see *Huff v. Watkins*, 20 S. C. 477; 23 Blatch. 457; 80 Va. 873.

<sup>2</sup> *Wms. Exrs.* 1740.

<sup>3</sup> *Mellen v. Baldwin*, 4 Mass. 481; 1 Daly, 443; *Potter v. Van Vranken*, 36 N. Y. 619, 627. Cf. *Wms. Exrs.* 1730.

<sup>4</sup> As in detinue. *Wms. Exrs.* 1730; *W. Jones*, 173; 3 Dev. L. 303; 1 Leigh, 86, 19 Am. Dec. 739. Detinue, unlike replevin, is for detaining unlawfully rather than tortiously acquiring. But cf. *Jones v. Littlefield*, 3 Yerg. 133. As in assumpsit. 1 Cowp. 375; *Collen v. Wright*, 7 El. & Bl. 647. Or action for use and occupation. *Ib.* And see *United States v. Daniel*, 6 How. (U. S.) 11, 12 L. Ed. 323. In general, as to waiving the tort and all special damages, and suing as for proceeds, etc., see 1 Chitty Pl. (16th Am. Ed.) 112, Perkins's note. As in various other instances, the common law, while insisting upon a legal maxim which, rigidly applied, might work injustice, favored artifice and the dexterous application of forms for correcting the worst mischief; so that its courts might render a righteous judgment while maintaining the severe aspect.

allowed here, as with actions on behalf of a decedent's estate;<sup>1</sup> and often, too, by the same enactment.<sup>2</sup>

374. **Concerning the survival of actions with respect to real estate**, ejectment raised difficulties not now of practical consequence.<sup>3</sup> Trespass for wrongful possession by a decedent did not lie against his executor or administrator and was unavailable except for account in equity.<sup>4</sup> Waste did not give a survival of remedy; this being a tort which died with the person who committed it.<sup>5</sup>

375. **Wherever the decedent was bound by a covenant whose performance was not personal to himself** and terminable by his death, his executor or administrator shall also be bound by it, even though not named in the deed. And whether the covenant was broken during the life of the decedent or after, so long as it was a continuing and express covenant, and the appropriate rule of limitations leaves the estate still unsettled in the representative's hands, the latter is answerable in damages for its breach.<sup>6</sup>

<sup>1</sup> *Supra*, 282.

<sup>2</sup> *Wms. Exrs.* 1734; *Powell v. Rees*, 7 Ad. & El. 426 (trespass). In many American States the survival of actions for torts of a decedent is widely extended, so as not only to embrace causes grounded in an injury to one's person or character, but to permit of replevin and various other forms of action without particular limitation as to the time when the offence was committed. Deceit, malpractice, etc., are thus in some States made a good cause of action notwithstanding the offender's death. *Nettleton v. Dinehart*, 5 Cush. 543; *Shafer v. Grimes*, 23 Iowa, 550; *Haight v. Hoyt*, 19 N. Y. 464. The reader is referred to the statutes of the respective States on this subject. See further, 6 Jones, 60; *Atterbury v. Gill*, 2 Flip. 239; 28 Fed. R. 460 (infringement of patent); *Clark v. Carroll*, 59 Md. 180; *Brackett v. Griswold*, 103 N. Y. 425, 9 N. E. 438 (conspiracy to defraud). But directly or by implication, all such statutes appear to conform to the general policy which accords to executors and administrators, not themselves in default, a special and brief period of limitations, in order that they may settle up the estate expeditiously and upon a full knowledge of the claims for which officially they shall be held answerable. See Part V, c. 1, *post*.

<sup>3</sup> *Farrall v. Shea*, 66 Wis. 561, 29 N. W. 634; *Wms. Exrs.* 1731.

<sup>4</sup> *Harker v. Whitaker*, 5 Watts, 474; *Caton v. Coles*, L. R. 1 Eq. 581. But rent due from a decedent might be recovered. See *post*, 376.

<sup>5</sup> Yet, upon the decedent's tort, as for instance in cutting down trees or digging coal, there might accrue the less remunerative right of action against the representative, as for money received by the estate in consequence. *Wms. Exrs.* 1732; *Powell v. Rees*, 7 Ad. & El. 426; *Moore v. Townshend*, 33 N. J. 284, 36 Am. Rep. 542. Or a bill in equity might lie for account. 1 P. *Wms.* 406. And see as to equitable waste *Lansdowne v. Lansdowne*, 1 Madd. 116; *Wms. Exrs.* 1732, 1733. And see 382, *post*. For statute changes on this point see *Taylor Landl. & Ten.* § 689.

<sup>6</sup> As under a lease. 3 Mod. 326; *Wells v. Betts*, 10 East, 316; *Hovey v. Newton*, 11 Pick. 421; *Wms. Exrs.* 1750; *Taylor Landl. & Ten.* § 669; *Chamberlain v. Dunlop*, 126 N. Y. 45, 22 Am. St. Rep. 807, 26 N. E. 966. The rule is stated differently as to mere covenants in law not express. *Wms. Exrs.* 1752. Cf. *Coffin v. Talman*, 8 N. Y. 465 (mere personal covenant limited). As to covenant running with the land, where lease is assigned, see *Greenleaf v. Allen*, 127 Mass. 248; *Moule v. Garrett*, L. R. 5 Ex. 132; *Taylor*, § 669. And see 13 Mass. 405; 16 Hun, 177; *Dwight v. Mudge*, 12 Gray 23; *Deane v. Caldwell*, 127 Mass. 242; *supra*, 353.

376. The personal representative's liability for rent of premises follows, so far as may be, the foregoing doctrines. For a promise under seal to pay rent constitutes a covenant, and justifies for its breach an action of covenant;<sup>1</sup> though there may be a tenancy without a lease, and of a more precarious nature.<sup>2</sup> As respects a liability for rent more generally, the executor or administrator is at least chargeable from assets with rent in arrear at the time of his decedent's death.<sup>3</sup>

377. As to covenants concerning real estate, other questions of liability may arise.<sup>4</sup>

378. The liability of the representative on a joint or several contract of his decedent is also considered.<sup>5</sup>

379. The liability of the representative of a deceased partner follows a like rule.<sup>6</sup>

<sup>1</sup> Damages for breaches of a covenant to pay rent, before and after the death of the lessee, recovered in one action against his personal representative. *Greenleaf v. Allen*, 127 Mass. 248.

<sup>2</sup> As to assignment or surrender of the lease, see *Taylor*, §§ 402-413; 3 Mod. 325; *supra*, 353; 11 Mass. 494; *Dean v. Caldwell*, 127 Mass. 242.

<sup>3</sup> *Taylor Landl. & Ten.* § 459; *Turner v. Cameron*, 5 Ex. 932; *Wms. Exrs.* 1731. Case of lease, etc., distinguished. *Howland v. Coffin*, 12 Pick. 105; *Hutchings v. Bank*, 91 Va. 68, 20 S. E. 950. And see as to the representative's liability for a ground rent, *Van Rensselaer v. Platner*, 2 Johns. Cas. 17; *Quain's Appeal*, 22 Penn. St. 510. As to recognition of assignee as tenant, see *Taylor Landl. & Ten.* § 620; *Wms. Exrs.* 1752; 4 Mod. 71. See further, 3 M. & G. 297; *Taylor*, § 459; *Wms. Exrs.* 1761; *Pugsley v. Aikin*, 11 N. Y. 494; *Inches v. Dickinson*, 2 Allen, 71, 79 Am. Dec. 765. See also, *Williams v. Heales*, L. R. 1 C. P. 177; *supra*, Pt. II, c. 8; 2 H. & C. 896.

Executors and administrators, though considered assignees in law of a term demised, may waive or incur an individual liability by their own acts of omission or commission. But the personal representative cannot be charged personally as assignee, where he waives or surrenders the term. And this he should do in prudence, if the tenancy is unprofitable or threatens to involve him beyond the assets at his disposal. For, although an executor or administrator may be liable to respond to the covenants of a lease from the assets, he may at any time discharge himself from individual liability, by himself assigning over, even to a pauper, if the landlord will not accept his surrender of the premises. *Remnant v. Bremridge*, 8 Taunt. 191; *Wms. Exrs.* 1758; 1 Kay & J. 575; 1 B. & P. 21; 4 My. & Cr. 1534. But, if he underlets, the occupation of the under-tenant is his occupation, and he becomes personally liable as assignee of the lease. *Bull v. Sibbs*, 8 T. R. 327; 18 Barb. 608; *Taylor*, § 461. See further, *Martin v. Black*, 9 Paige, 641, 38 Am. Dec. 574; *Copeland v. Stephens*, 1 B. & A. 593; 12 C. B. N. s. 116; *Wms. Exrs.* 1756. Statute provisions may locally apply.

<sup>4</sup> See as to equity where decedent had not paid purchase-money for land purchased, before his death, *Wms. Exrs.* 1762; *Whittaker v. Whittaker*, 4 Bro. C. C. 31; *Broome v. Monck*, 10 Ves. 597; 5 Beav. 6.

<sup>5</sup> See *Wms. Exrs.* 1741 (limited by assets); *May v. Woodward*, 1 Freem. 248; 1 Chitty Pl. 58; *Grymes v. Pendleton*, 4 Call. 130; 3 Russ. 424. As to survivorship here, see *Rice Appellant*, 7 Allen, 115; 124 Mass. 219; 15 N. Y. Supr. 313; *Hedderly v. Downs*, 31 Minn. 183, 17 N. W. 274; 78 Ala. 162; *Moses v. Wooster*, 115 U. S. 283, 29 L. Ed. 391.

<sup>6</sup> *Sampson v. Shaw*, 101 Mass. 145. Partners may be sued in equity on the assumption that a partnership debt is both joint and several; conformably to which theory the creditor may not only reach assets of a deceased partner in his representative's hands, should the surviving partner fail to satisfy his claim in full, but, as later de-

380. The personal liability of stockholders is usually defined specifically by the general or special act under which the corporation was created. But, as to enforcing a personal liability on the part of the decedent, the equity doctrine appears to be, so far as developed, that executors and administrators of deceased shareholders become liable *prima facie* in their representative capacity, as for other debts of the deceased and must respond from the assets.<sup>1</sup>

381. Exoneration of property specifically bequeathed is sometimes presumed.<sup>2</sup>

382. (2) As to the liability which a personal representative incurs in respect of his own acts while administering the estate. Aside from an immediate liability upon his own contracts touching the estate<sup>3</sup> he is liable for all ill consequences suffered by the estate through his failure to bestow due care and diligence.<sup>4</sup> For losses to others occasioned through his bad faith and misconduct, too, the representative is personally liable.<sup>5</sup>

383. This standard of liability is that adopted by courts of equity and probate in concurrence with the common sense of mankind. But the common law appears to have pursued a somewhat different theory in dealing with such matters; an odd and, indeed, an illiberal

cisions hold, may pursue the assets of a deceased partner, as matter of preference, leaving the latter's representatives and the surviving partner to adjust their respective equities together. *Liverpool Bank v. Walker*, 4 De G. & J. 24; 3 Meriv. 619; 4 My. & Cr. 109; 2 Russ. & My. 495; *Wms. Exrs.* 1743, 1744, and cases cited. The adjustment or winding-up of partnership affairs belongs to equity courts. As to winding up a trade with the surviving partner, see *supra*, 325, 326. And see *Bradley v. Brigham*, 144 Mass. 181, 10 N. E. 793; *Blakely v. Smock*, 96 Wis. 611, 71 N. W. 1052.

<sup>1</sup> *Baird's Case*, L. R. 5 Ch. 725, and cases cited. The charter or act of incorporation must be examined to see whether the liability is made less. And see *Grew v. Breed*, 10 Met. 679; *New England Bank v. Stockholders*, 6 R. I. 154, 75 Am. Dec. 688; 33 Beav. 435. Cf. *Cutright v. Stanford*, 81 Ill. 240 (such personal liability postponed, at all events, to direct proceedings to reach the corporate assets). As to new shares or rights issued after decedent's death, see *Leeds Banking Co., Re*, L. R. 1 Ch. 231.

<sup>2</sup> E.g., freedom from storage charges, pledge, tax, etc. *Knight v. Davis*, 3 My. & K. 558; *Stewart v. Denton*, 4 Dougl. 219. But the just intention of the testator, as manifested by the will, should prevail where such presumption is overcome. Nor is the thing specifically bequeathed, unless the will so prescribes, to be put, at the cost of the estate, in better condition than the testator left it. Stock specifically bequeathed is bequeathed as with a clear title; but so as to relieve the estate, nevertheless, from the whole burden of further assessments, as well as to deprive it of the benefit of subsequent dividends. *Armstrong v. Burnet*, 20 Beav. 424; 26 Beav. 384. If the thing had ceased to exist at the testator's death, or if no title could, under the circumstances, devolve upon his personal representative, the bequest would prove of no avail, for presumably the estate would not be bound to supply an equivalent. *Wms. Exrs.* 1764; 5 Sim. 196; *Hickling v. Boyer*, 3 Mac. & G. 635. See 461, *post*, as to specific legacies.

<sup>3</sup> See 256, 292, *supra*; Am. Dig. 1897-1906, §§ 428-430.

<sup>4</sup> *Supra*, 313-315 (i.e., "ordinary" where compensated).

<sup>5</sup> 77 N. Y. S. 1106; *Porter v. Long*, 83 N. W. 601, 124 Mich. 584. And see *Booth v. Booth*, 1 Beav. 125; *Jacob*, 198; *Williams v. Nixon*, 2 Beav. 472.



one.<sup>1</sup> It recognized direct remedies against the personal representative, founded upon the suggestion of a *devastavit* on his part or wasting the assets.<sup>2</sup>

384. **The essential principle at the basis of this rule of *devastavit* operates, doubtless, whenever and wherever the personal representative should personally respond for his official conduct; and whether the maladministration be wanton, wilful, and fraudulent on his part, or founded in inexcusable carelessness, and whether the misconduct be active or passive, so long as those interested in the assets suffer thereby.**<sup>3</sup> Official responsibility, in a word, involves, in any station of life, the performance of one's duty: first, honestly and uprightly, and next, with the exercise of a reasonable degree of care and diligence according to circumstances, the nature of the trust imposed, and the limitations of authority prescribed by law.<sup>4</sup>

385. **An executor or administrator cannot be sued in his representative character, for his own wrongful act committed, so as to inflict injury upon another, while administering the estate. For, if liable at all, the act is outside the scope of his official authority, and he must be sued and held responsible as an individual.**<sup>5</sup> Only a few special instances of liability for *devastavit* or waste, at the

<sup>1</sup> *Supra*, 315.

<sup>2</sup> *Wms. Exrs.* 1985. For such *devastavit*, the executor or administrator should answer out of his own means, so far as he had or might have had assets of the deceased. *Bac. Abr. Exors. L.* 1; *supra*, 373. Contrast the modern requirement of an accounting, with allowance or disallowance of items, etc. Part VII, *post*.

<sup>3</sup> How wide the scope of this doctrine, we have already seen, while investigating the general rights and powers of the personal representative. We shall see its further application hereafter, when we come to consider the payment of debts and claims against the estate, the satisfaction of legacies, and the transfer or distribution of the final residue; and, in short, throughout the entire administration of the estate, and so long as he pursues the official trust reposed in him.

<sup>4</sup> See *Powell v. Evans*, 5 Ves. 843; 13 Ves. 410; 1 Madd. 298; 382, *supra*.

<sup>5</sup> 12 Fed. Rep. 279; *Thompson v. White*, 45 Me. 445; *Parker v. Barlow*, 93 Ga. 700. 21 S. E. 213. But, in some instances, where the gist of the offence consists in a continuing wrongful detention of the plaintiff's goods, the wrong having really originated with the decedent, a suit may be brought, if the plaintiff so elect, against the executor or administrator in his representative capacity. See as to trover, *Walter v. Miller*, 1 Harr. (Del.) 7. And see *Denny v. Booker*, 2 Bibb, 427; *Thompson v. White*, 45 Me. 445; *Clapp v. Walters*, 2 Tex. 130; *supra*, 372; *Farrelly v. Ladd*, 10 Allen, 127 (action for money had and received); 99 Mass. 334; 13 Mass. 454. Trover lies, under the statutes of some States, against an executor or administrator in such capacity, for a conversion, as, e.g., of bonds and mortgages, by his testate or intestate. *Terhune v. Bray*, 16 N. J. L. 54. Cf. *Chaplin v. Burett*, 12 Rich. 284. Estate not liable for the representative's own tort, where no pecuniary advantage ensues therefrom. *Carr v. Tate*, 107 Ga. 237, 33 S. E. 47. Statute directions on such points seem desirable; for the old common law is not explicit enough, and its theory, that the right of action dies with the offender, has been discarded to a great extent by modern legislatures. See *supra*, 373; 104 N. C. 458. And see Appendix, *post*.

common law, need here be specially considered; for the general doctrine is sufficiently applied under appropriate heads in other chapters.

386. Thus, at common law, the arbitration, compromise, or release of a debt or claim due the estate, was regarded as a waste on the part of the personal representative, if it resulted in loss to the estate.<sup>1</sup>

387. Modern legislation provides for the arbitration or compromise of claims against or in favor of an estate, often under judicial safeguards.<sup>2</sup>

<sup>1</sup> Concerning arbitration, the point appears to have been stated in the old books quite sternly. Wentw. Off. Ex. 304, 14th ed.; 3 Leon. 53; 1 Ld. Raym. 363, by Holt, C. J. And see *Reitzell v. Miller*, 25 Ill. 67; *Yarborough v. Leggett*, 14 Tex. 677; *Nelson v. Cornwell*, 11 Gratt. 724. As to compromise, however, later qualifications were admitted, applying in good reason to either act, which the court of chancery saw fit to insist upon, and which, as to either compromise or arbitration, are now usually insisted upon. Wms. Exrs. 1800; *Blue v. Marshall*, 3 P. Wms. 381; *Pennington v. Healey*, 1 Cr. & My. 402. The universal test for modern times should be, whether, in compromising or submitting to arbitration, the representative acted with fidelity and due prudence. See 4 Pick. 454; *Chadbourn v. Chadbourn*, 9 Allen, 173; 1 Fairf. 137; *Kendall v. Bates*, 35 Me. 357.

<sup>2</sup> See 23 & 24 Vict. c. 145, §§ 30, 34; Wms. Exrs. 1801. And as to claims, see *Woodin v. Bayley*, 13 Wend. 453; 30 Barb. 110; *Peter's Appeal*, 38 Penn. St. 239; *Reitzell v. Miller*, 25 Ill. 67; *Kendall v. Bates*, 35 Me. 357; *Childs v. Updyke*, 9 Ohio St. 333. Cf. 14 Tex. 677; *McDaniels v. McDaniels*, 40 Vt. 340. See also *Ponce v. Wiley*, 62 Ga. 118; 30 Kan. 118, 1 P. 36; *Browne v. Preston*, 38 Md. 373; 19 R. I. 499, 34 A. 1112. The practitioner should consult the local code on this subject, and local decisions construing its provisions. Such statutes are for a convenient and expeditious settlement of the estate. Cf. 2 Redf. 545.

The effect of all such legislation is mainly to sanction a course of proceeding on the part of an executor or administrator, formerly open to him, though at a greater personal peril. At the common law an executor or administrator might compound or release a debt due the estate, or arbitrate, if he could afterwards show that his act was beneficial to the estate; but he might have to suffer personally as for waste; for, objection being made by parties interested under the administration, he had the onus of proving that he had acted judiciously and that the estate had not suffered in consequence. Wms. Exrs. 1799, 1800, and cases cited; 1 Ld. Raym. 369; 5 De G. M. & G. 770; 3 P. Wms. 381; 11 Gratt. 724; *Boyd v. Oglesby*, 23 Gratt. 674; *Davenport v. Congregational Society*, 33 Wis. 387; 19 Mont. 95, 47 P. 650; *Alexander v. Kelso*, 59 Tenn. 311. See also 96 P. 1095 (Ore.); *Wood v. Tunnicliff*, 74 N. Y. 38; *Geiger v. Kaigler*, 9 S. C. 401. By procuring previous authority from the probate court, as some of these statutes now provide, and by pursuing its terms, the good faith of the executor or administrator is sufficient warrant that the arbitration or compromise will stand; and to relieve him from personal liability for ensuing consequences is, we may assume, the general purpose of all such legislation, even where such permission from the probate court is not contemplated. *Wyman's Appeal*, 13 N. H. 18, 20, *per* Parker, C. J.; *Chadbourn v. Chadbourn*, 9 Allen, 173; *Chouteau v. Suydam*, 21 N. Y. 179. Cf. 87 P. 74. See further, *Noyes v. Phillips*, 57 Vt. 229; *Henry County v. Taylor*, 36 Iowa, 259. See also 298, *supra*.

This right of arbitration or compromise is extended by local legislation to other instances, and for sundry express purposes; as in case of an insolvent estate; or as to the personal claim of executor or administrator; or in will contests. *Gilmore v. Hubbard*, 12 Cush. 220; *Green v. Creighton*, 7 Sm. & M. 197; 115 Mich. 556, 78 N. W. 977.

388. **The representative is not called upon to forgive or release a debt or claim**, ordinarily, to which he knows the estate was entitled, without receiving some consideration; and if he does so gratuitously and to the detriment of the estate, he is liable as for *devastavit*, even though he acted with honest purpose.<sup>1</sup> But modern statutes lessen the liability for releases given upon sundry considerations of convenience to the estate, in various prescribed instances, on the analogy of a compromise.<sup>2</sup>

389. **The bar of limitations need not be pleaded usually against a just debt of the decedent.**<sup>3</sup>

390. **But special local statutes of limitation are binding upon the estate.**<sup>4</sup>

<sup>1</sup> Wms. Exrs. 1799, 1800; Cro. Eliz. 43; 1 Ld. Raym. 368; 1 Freem. 442; *People v. Pleas*, 2 Johns. Cas. 376. And as to extensions, see 25 La. Ann. 181; 306, *supra*; 2 Redf. 545.

<sup>2</sup> See local statute. See also *Davenport v. Congregational Society*, 33 Wis. 387; 387, *supra*.

<sup>3</sup> This is the equity rule rather than that of the common law. See 9 Dow. & Ry. 43, disapproved in *Hill v. Walker*, 4 Kay & J. 166; *Lewis v. Rumney*, L. R. 4 Eq. 451; Wms. Exrs. 1804. As to America, see *Fairfax v. Fairfax*, 2 Cranch, 25; 13 Mass. 162; *Hodgdon v. White*, 11 N. H. 208; *Thayer v. Hollis*, 3 Met. 369; *Ritter's Appeal*, 23 Penn. St. 95; *Pollard v. Sears*, 28 Ala. 484, 65 Am. Dec. 364; *Miller v. Dorsey*, 9 Md. 317; *Payne v. Pusey*, 8 Bush, 564; 2 Desau. 577; *Batson v. Murrell*, 10 Humph. 301, 51 Am. Dec. 707. Local codes to a certain extent, however, regulate this subject; and the equity rule in some jurisdictions appears to be that the personal representative can only exercise his discretion where the statute of limitations operates after his appointment, or perhaps since the decedent's death; and that debts, barred while the decedent was alive, he cannot assume arbitrarily the power to pay. *Wenham, Re*, (1892) 3 Ch. 59; *Patterson v. Cobb*, 4 Fla. 481; *Rector v. Conway*, 20 Ark. 79. *Contra*. *Hill v. Walker*, 4 K. & G. 166. A testator may expressly direct his executor to disregard the statute of limitations. *Campbell v. Shoatwell*, 51 Tex. 27. And see 90 Ala. 147, 7 So. 919 (real estate concerned). And see 3 Edw. Ch. 180; 4 Bradf. 260; 14 W. Va. 211; *McKinlay v. Gaddy*, 26 S. C. 573, 2 S. E. 497; 33 W. Va. 476, 10 S. E. 810; *Payne v. Pusey*, 8 Bush, 564 (debt due representative). In fact, distributees or residuary legatees are immediately interested in controversies of this kind. See *Midgley v. Midgley*, (1893) 3 Ch. 282.

In England and some parts of the United States, it is held that an acknowledgment of the decedent's debt by the personal representative will take the case out of the statute. *Briggs v. Wilson*, 5 De G. M. & G. 12; 5 M. & W. 120; *Semmes v. Magruder*, 10 Md. 242; *Northcut v. Wilkins*, 12 B. Mon. 408; *Brewster v. Brewster*, 52 N. H. 52; *Shreve v. Joyce*, 36 N. J. L. 44, 13 Am. Rep. 417. But the rule is not universal. *Forney v. Benedict*, 5 Penn. St. 225; *Foster v. Starkey*, 12 Cush. 324; *McLaren v. McMartin*, 39 N. Y. 38. And see *Scholey v. Walton*, 12 M. & W. 514; *Shreve v. Joyce*, 36 N. J. L. 44, 13 Am. Rep. 417; 2 B. & C. 28; 5 De G. M. & G. 12; *Tullock v. Dunn*, Ry. & Moo. 416.

<sup>4</sup> In most of our States express provision is now made that claims against an estate shall be presented within a certain time after the death of the debtor or the appointment of his executor or administrator, or be forever barred; and the reason of such legislation being sound, and the language of the enactment explicit, the personal representative is bound to comply with the requirement. 16 Mass. 172; *Heath v. Wells*, 5 Pick. 140, 16 Am. Dec. 383; *Langham v. Baker*, 5 Baxt. 701; *Littlefield v. Eaton*, 74 Me. 516; Part V, c. 1, *post*; *Ticknor v. Harris*, 14 N. H. 272, 40 Am. Dec. 186; *Harter v. Taggart*, 14 Ohio St. 122. Creditors themselves are thus put upon the alert; and their own want of vigilance cannot protect their claims against the statute barrier, where they

391. Opportunity to ascertain whether the estate is insolvent is usually allowed the representative.<sup>1</sup>

392. An executor or administrator exercises no option of disregarding limitations as to debts or claims which never had a binding force, since the law invests him with no authority on the decedent's

have relied upon the representative, and forbore to sue at his request; though the local statute may provide its own special exceptions. See among numerous cases, *Bradley v. Norris*, 3 Vt. 369; *McMurrey v. Hopper*, 43 Penn. St. 468; *Fisher v. Mossman*, 11 Ohio St. 42; *Allen v. Moer*, 16 Iowa, 307; *Andrews v. Huckabee*, 30 Ala. 143; *Stark v. Hutton*, 3 N. J. Eq. 300; *Pope v. Boyd*, 22 Ark. 535; *Griswold v. Bigelow*, 6 Conn. 258; *Yingling v. Hesson*, 16 Md. 112; *Lay v. Mechanics' Bank*, 61 Mo. 72.

Such statutes properly reckon the period from the date of the representative's appointment; for the running of such a period between the decedent's death and the qualification of his executor or administrator would work injustice to the creditor. 33 Ark. 141. The recovery of a claim against the estate of a deceased person, which originates after, or from its nature cannot be ascertained within the time limited by the court for the exhibition of claims, is not barred by its non-exhibition within that time. 6 Conn. 258; *Hawley v. Botsford*, 27 Conn. 80; *Chambers v. Smith*, 23 Mo. 174. Statutes sometimes provide; but the natural recourse here is to sue the representative. *Bacon v. Thorp*, 27 Conn. 251. And see 418, 419, *post*; *Oates v. Lilly*, 84 N. C. 643; *McGrath v. Barnes*, 13 S. C. 323, 36 Am. Rep. 687. See further, *Knight v. Cunningham*, 160 Mass. 580, 36 N. E. 466. See *Teague v. Corbitt*, 57 Ala. 529.

With reference to a creditor against the estate, the rule, irrespective of statute qualifications, appears to be this: (1) death of the debtor does not suspend the running of the statute where the cause of action accrued before his death; (2) but where the cause of action accrues after his death, the statute does not begin to run until an executor or administrator is qualified, inasmuch as the creditor meanwhile has found no one whom he could sue; (3) and where the cause of action arises on a contract, etc., by the representative himself, the statute begins to run from the time such cause of action accrued. But statute sometimes corrects the hardship of (1). See *Penny v. Brice*, 18 C. B. N. s. 393; *Davis v. Garr*, 6 N. Y. 124, 55 Am. Dec. 387; *Burnett v. Brian*, 6 N. J. L. 377; *Hall v. Deatly*, 7 Bush, 687; *Baker v. Brown*, 18 Ill. 91; *Jackson v. Hitt*, 12 Vt. 285. As to (2), see *Burdick v. Garrick*, L. R. 5 Ch. 233; *Clark v. Hardman*, 2 Leigh, 347; *Andrews v. Hartford R.*, 34 Conn. 57; *Sherman v. Western R.*, 24 Iowa, 515. As to part payment or acknowledgment, see 17 Johns. 330; 5 Binn. 573, 6 Am. Dec. 428. And see 134 Mass. 115. Equity will sometimes correct a fraud or mistake by way of exception to rules. *Stromo v. Bissel*, 20 Iowa, 68; *Brooksbank v. Smith*, 2 Y. & C. 58; *Ingle v. Richards*, 28 Beav. 366; *Barfield v. King*, 29 Ga. 288. See further, as to the bar, *Groves v. Williams*, 68 Ga. 598; 39 Ark. 577; 142 Mass. 248, 7 N. E. 851; *Fowler v. True*, 76 Me. 43; *Morgan v. Hamlet*, 113 U. S. 449; 62 Tex. 375. Consult local statute. See as to representative's own negligence in collecting claim in probate court, *Harrington v. Keteltas*, 92 N. Y. 40. And see as to ranking, *Johnson v. Waters*, 111 U. S. 640, 28 L. Ed. 547. The statute which bars all claims which are not sued against the estate within a certain period refers naturally to claims against the deceased and not to those arising upon some contract with his representative after his death. *Coburn v. Harris*, 58 Md. 87. A representative who promises to pay regardless of such statute may bind himself, but he does not bind the estate, nor the sureties on his bond. *Judge of Probate v. Ellis*, 63 N. H. 366; *Robinson v. Hodge*, 117 Mass. 224.

This whole policy of barring out claims which are tardily presented and enforced is not so much to exclude them as to allow the estate to be expeditiously settled and distributed; and hence new assets or a new surplus to distribute may change the face of the situation, as legislation often provides.

<sup>1</sup> See *Studley v. Willis*, 134 Mass. 155; 116 Mass. 435 (local statute forbidding suit against the representative within a specified time, *i.e.*, a year, etc.).

behalf to dispense illegal favors or perform obligations simply moral.<sup>1</sup>

393. The concurrence or acquiescence of those injuriously affected by the *deceit* of an executor or administrator will, agreeably to general maxims, release the latter party from further responsibility for the injurious act or transaction; and so, doubtless, their release or acquittance as for satisfaction and indemnity rendered by a mutual private arrangement.<sup>2</sup>

394. The complicity of third persons in the *deceit* of an executor or administrator renders them also liable.<sup>3</sup>

395. The liability of an executor or administrator, in respect of his own contracts touching the estate, may be gathered in a measure from our previous discussion of his rights.<sup>4</sup> In general, where the claim or demand wholly accrued in his own time, the representative was formerly held personally liable alone.<sup>5</sup> And some decisions still countenance the doctrine that no action at law will lie against an executor or administrator, as such, except upon some claim which originated against the testator or intestate during his lifetime, notwithstanding the contract sued upon was made by him for the benefit of the estate.<sup>6</sup> But, according to the weight of modern authorities, the executor or administrator is liable upon such promise, in his representative, as well as his personal capacity, where the claim or demand accrues in his own time, provided that which constituted the consideration of the promise, or the cause of action, arose in the lifetime of the decedent.<sup>7</sup>

<sup>1</sup> E.g., where contract is invalid under statute of frauds. *Baker v. Fuller*, 69 Me. 152; *Rownen, Re*, 29 Ch. D. 358.

<sup>2</sup> But a court of equity or probate is at liberty to inquire into all the circumstances which induced such action on their part, and ascertain whether their conduct really amounts to such sanction, ratification, or acquittance as ought justly to relieve the representative from further liability. *Burrows v. Walls*, 5 De G. M. & G. 233; *Wms. Exrs.* 1836; 25 Beav. 177, 236. Cf. as to mere laches, *Birch, Re*, 27 Ch. D. 622. See also as to waste of assets, *McMahon v. Paris*, 87 Ga. 660, 13 S. E. 572.

<sup>3</sup> *Rogers v. Fort*, 19 Ga. 94. And see *supra*, 359.

<sup>4</sup> *Supra*, 256, 290, 292.

<sup>5</sup> *Wms. Exrs.* 1771; *Cro. Eliz.* 91; *Cowp.* 289; *Jennings v. Newman*, 4 T. R. 348; *Cocke v. Trotter*, 10 Yerg. 213; *Adams v. Adams*, 16 Vt. 228; *Beaty v. Gingles*, 8 Jones L. 302.

<sup>6</sup> See *Valengin v. Duffy*, 14 Pet. 282, 10 L. Ed. 457, *per Taney*, C. J.

<sup>7</sup> *Luscomb v. Ballard*, 5 Gray, 403; 66 Am. Dec. 374; *Ashby v. Ashby*, 7 B. & C. 449.

Nice distinctions have sometimes been drawn in trying to shield the representative from personal loss, where the cause of action originated essentially during the decedent's life, notwithstanding his own added undertaking. See *Rose v. Bowler*, 1 H. Bl. 108; 7 Taunt. 586; 7 B. & C. 449, 452; *Wms. Exrs.* 1771-1776. And see *Scott v. Key*, 9 La. Ann. 213; *Chouteau v. Suydam*, 21 N. Y. 179; 1 Kern. 494. Where assets are deficient, a reliance upon the individual liability of a wealthy representative may be advantageous for the creditor; but the reverse is sometimes the actual situation, and hence the advantage of giving the plaintiff an option. In modern practice, how-

396. If an executor or administrator promises in writing that, in consideration of having assets, he will pay a particular debt of his decedent, or otherwise brings himself within the rule of a personal collateral undertaking for his decedent's obligation, he may be sued on this promise in his individual capacity, and the judgment against him will be *de bonis propriis*.<sup>1</sup> And, in general, where the nature of the debt is such as renders it binding upon the representative as an individual, whether because he contracted it or because he has assumed the liability which originated against the decedent, the judgment will be against him *de bonis propriis*, although he promised nominally in the official capacity.<sup>2</sup>

397. In causes of action wholly accruing after his decedent's death, the personal representative is in general liable individually.<sup>3</sup> And wherever an action is brought against an executor or administrator, on promises said to have been made by him after his decedent's death, he is chargeable in his own right and not as representative.<sup>4</sup> But for one to maintain such suit against the representative individually, the latter should have been an actual party to the contract or transaction.<sup>5</sup>

ever, the sufficiency of a probate bond, with principal and sureties, may be of great consequence. And, consequently, the plaintiff has been remitted to the actual assets, the court treating the representative's own engagement as presupposing an adjustment on such a basis. See Taney C. J., in *De Valengin v. Duffy*, 14 Pet. 282, 10 L. Ed. 457; *supra*, 382.

<sup>1</sup> *Supra*, 255; *Wms. Exrs.* 1783; *Cro. Eliz.* 91; *Taliaferro v. Robb*, 2 Call. 258. As to the necessity of averring assets, cf. *Wms. Exrs.* 1776; 7 Taunt. 580; 3 Bing. 20. The plaintiff should in such case aver assets, or a forbearance to sue, or some other consideration.

<sup>2</sup> *Wms. Exrs.* 1783; *Corner v. Shew*, 3 M. & W. 350; *supra*, 256; *Johnston v. Union Bank*, 37 Miss. 526; *Wood v. Tunncliffe*, 74 N. Y. 38. And see *Rusling v. Rusling*, 47 N. J. L. 1 (even though decedent might not have been suable on his promise).

<sup>3</sup> *De Valengin v. Duffy*, 14 Pet. 282, 10 L. Ed. 457; *Kerchner v. McRae*, 80 N. C. 219. And see 382.

<sup>4</sup> *Wms. Exrs.* 1771; *Cowp.* 289; *Jennings v. Newman*, 4 T. R. 348; *Clarke v. Alexander*, 71 Ga. 500. In general, an action for goods sold and delivered to one as representative, or for work done, or services rendered, at his request, in the settlement of the estate, should be brought against the defendant personally, and not in his representative character. *Corner v. Shew*, 3 M. & W. 350; *Austin v. Munro*, 47 N. Y. 360; 12 Johns. 349; *Matthews v. Matthews*, 56 Ala. 292; *supra*, 256; *Lovell v. Field*, 5 Vt. 218; *Baker v. Moor*, 63 Me. 443. Wherever, in fact, the action is brought against the executor or administrator on his own contracts and engagements, though made for the benefit of the estate, this rule holds true; and his promise "as executor," or "as administrator," will not alter its application. *Beatty v. Gingles*, 8 Jones L. 302; 7 T. B. Mon. 1; *Barry v. Rush*, 1 T. R. 691; 8 Mass. 199, 5 Am. Dec. 83; *Davis v. French*, 20 Me. 21, 37 Am. Dec. 36. The judgment is rendered *de bonis propriis*, and he must respond accordingly. *Seip v. Drach*, 14 Penn. St. 352; *Powell v. Graham*, 7 Taunt. 585; *Corner v. Shew*, 3 M. & W. 350; *Wms. Exrs.* 1783. Cf. 290-294, *supra*.

<sup>5</sup> *Luscomb v. Ballard*, 5 Gray, 403, 66 Am. Dec. 374. And see *Matthews v. Matthews*, 56 Ala. 292; *Tucker v. Whaley*, 11 R. I. 543. As to suing an executor who is also residuary legatee, and who has given bond to pay debts and legacies, see 140 Mass. 66, 2 N. E. 780; 144 Mass. 238, 10 N. E. 818. And see as to real estate, *Belvin v. French*, 84 Va. 81, 3 S. E. 891.

398. But the exceptional instance of suing for funeral expenses is sometimes recognized, charging the executor or administrator in his representative character so that judgment may be rendered *de bonis decedentis*.<sup>1</sup>

398a. An executor or administrator who makes, indorses, or accepts negotiable paper is personally liable thereon, although he adds to his signature the name of his office.<sup>2</sup> In undertaking to bind the estate by a note, and failing for want of authority, the representative binds himself personally.<sup>3</sup>

398b. Inasmuch as a probate court has now exclusive jurisdiction, subject to appeal, of the estates of decedents and their final settlement and distribution, including the adjustment of the accounts of the personal representative, the old common-law action of negligence, as brought by residuary legatees or distributees against the former representative for wasting assets, is not to be favored.<sup>4</sup>

<sup>1</sup> *Hapgood v. Houghton*, 10 Pick. 154; *Seip v. Drach*, 14 Penn. St. 352; 1 Daly, 214; *Campfield v. Ely*, 13 N. J. L. 150; *Samuel v. Thomas*, 51 Wis. 549, 8 N. W. 361. But the case stands on its peculiar ground of exception; claims of this character taking the priority of most general debts originating with the decedent himself, and being *in genere*, nor depending wholly upon strict contracts with a representative. *Thomas, J.*, in *Luscomb v. Ballard*, 5 Gray, 405, 66 Am. Dec. 374; 134 Mass. 435; 139 Mass. 304, 52 Am. Rep. 708, 31 N. E. 720; *Fogg v. Holbrook*, 88 Me. 169, 33 L. R. A. 660, 33 A. 792. The modern English doctrine on this point is, that if the executor or administrator gives orders for the funeral, or ratifies or adopts the acts of another party who has given orders, he makes himself liable personally and not in his representative capacity; and such, too, is the rule of various States. *Corner v. Shew*, 3 M. & W. 350; *Wms. Exrs.* 1788, 1791; *Ferrin v. Myrick*, 41 N. Y. 315. As to supplying a tombstone, see 25 Hun, 4. As to necessities for the funeral which some one else ordered, see 13 Daly, 347. And see 421, *post*, as to funeral expenses.

*Qn.* whether valuable services rendered in taking care of the effects, etc., after the decedent's death, and before any representative was appointed, might not be brought within the reason of this same exception in meritorious instances. This service, like that of burial, may be performed out of kindness or necessity, as it were, and without a previous contract, as by a custodian who must search out the kindred. See *supra*, 193; *Luscomb v. Ballard*, 5 Gray, 403, 66 Am. Dec. 374.

When the law as to remedies proves so uncertain as to leave one in fundamental doubt as to whether one shall sue or be sued in the individual or representative capacity, in a particular instance, the legislature should intervene and make a more flexible rule. See doubts raised in *Austin v. Munro*, 47 N. Y. 360; *Snead v. Coleman*, 7 Gratt. 300, 56 Am. Dec. 112. At present, there is always great danger that a suit founded on a just cause of action may fall to the ground because of some misconception at the outset as to whether the contract originated with the decedent or the decedent's representative. See Appendix, *post*. And cf. the local practice code in any case.

<sup>2</sup> Nor does the mere mention of his decedent's estate in the instrument deprive it necessarily of its negotiable character; but to have that effect there must be a direction, express or implied, to pay from that fund, and not otherwise. *Schmittler v. Simon*, 101 N. Y. 554, 5 N. E. 452, and cases cited; *Higgins v. Driggs*, 21 Fla. 103; *Perry v. Cunningham*, 40 Ark. 185.

<sup>3</sup> *McCalley v. Wilburn*, 77 Ala. 549. And see 258, and cases cited.

<sup>4</sup> Appendix, *post*; 189, 520; *Graffam v. Ray*, 91 Me. 235, 39 A. 569. Simple probate proceedings may afford relief. 175 Mass. 199, 55 N. E. 893. Notwithstanding such representative has rendered his final account and resigned, he may still be cited into the probate court, as various codes provide.

## CHAPTER VI.

## CO-ADMINISTRATION AND QUALIFIED ADMINISTRATION.

399. These doctrines concerning the powers, duties, and liabilities of the personal representative apply, *mutatis mutandis*, to all executors and administrators. But, as already observed, administration is not always original and general, but qualified in various instances, as the circumstances of appointment may require.<sup>1</sup> General doctrines require, moreover, a special adaptation to suit the case, where two or more are appointed to the same trust.

400. (1) As to co-executors and co-administrators, their rights, duties and liabilities. Co-executors, unless the will under which they act directs otherwise, are to be treated in law as one and the same individual; and consequently whatever each one does is taken to be the act of both or all, their authority being joint and entire.<sup>2</sup> Hence, too, if one of them dies, the fiduciary interest, being joint and entire, will vest in the survivor.<sup>3</sup> Of two or more executors under a will, moreover, each is entitled to receive any part of the assets, and to collect any debts.<sup>4</sup> In short, as regards

<sup>1</sup> See *supra*, Part II, c. 4.

<sup>2</sup> Wms. Exrs. 911, 946; Rigby, *Ex parte*, 19 Ves. 462; Edmonds v. Crenshaw, 14 Pet. 166, 10 L. Ed. 402; Stewart v. Conner, 9 Ala. 803; Wilkerson v. Wooten, 28 Ga. 568; Alerding v. Allison, 83 N. E. 1006, 170 Ind. 252, 127 Am. St. Rep. 363; Gilman v. Healy, 55 Me. 120.

<sup>3</sup> See 405, *post*. Where a co-executor named in the will renounces probate, the others who qualify exercise all the authority and incur all the responsibilities incidental to the office. *Supra*, 51. See as to residuary co-bequest, 2 Bro. C. C. 220; 3 Bro. C. C. 455; Knight v. Gould, 2 My. & K. 295; Wms. Exrs. 948.

A note executed by one of two executors, in favor of himself and his co-executor, may be enforced by the two in an action against the indorsers as their joint and several contract. Faulkner v. Faulkner, 73 Mo. 327. But as to a purely joint contract cf. Moffat v. Van Millingen, 2 B. & P. 124 (one cannot sue himself).

<sup>4</sup> Edmonds v. Crenshaw, 14 Pet. 166, 10 L. Ed. 402; Stewart v. Conner, 9 Ala. 803. An assignment or release, valid under the general rules of administration, is valid when given by any one of them. Wms. Exrs. 946; 2 Ves. Sen. 267; Shaw v. Berry, 35 Me. 279, 58 Am. Dec. 702; 2 Barb. 151; Devling v. Little, 26 Penn. St. 502; Hoke v. Fleming, 10 Ired. L. 263. Cf. Pearce v. Savage, 51 Me. 410. As in case of a mortgage. Weir v. Mosher, 19 Wis. 311; 37 Barb. 466; George v. Baker, 3 Allen, 326. One may bind to an arbitration. Lank v. Kinder, 4 Harring. 457. Or a compromise. Weir v. Mosher, 19 Wis. 311. One may indorse over a promissory note made payable to the testator. Dwight v. Newell, 15 Ill. 333; Bogert v. Hertell, 4 Hill, 492; 9 Cow. 34. Or settle prudently an account with a debtor. Smith v. Everett, 27 Beav. 446. Or grant or surrender a lease or term. Simpson v. Gutteridge, 1 Madd. 616. And see 11 M. & W. 773. Or sell and dispose of assets on behalf of all. Cro. Eliz. 478; Murrell v. Cox, 2 Vern. 570. But cf. Sneesby v. Thorne, 7 De G. M. & G. 399. Or assent sufficiently to a legacy. Wms. Exrs. 948. Or make due acknowledgment that a debt is due. (1897) 2 Ch. 181. Or discharge a security taken for the payment of a debt due the estate, on a satisfaction made to him. People v. Keyser, 28 N. Y. 226, 84 Am. Dec. 338.



personal assets, any one of two or more co-executors may do whatever both or all could have done, and under like qualifications;<sup>1</sup> and the act of one within the honest and prudent scope of his duties binds the others.<sup>2</sup>

401. **In the settlement of an estate by co-executors, the exclusive custody and control** of the assets vests in no one of their number. Each executor has a right of possession to the personal property, and a right of access to the papers.<sup>3</sup> But there may be a contract between joint executors concerning the funds of the estate and management, and this upon perfectly valid consideration as between themselves.<sup>4</sup> And, in order to act with becoming prudence, it is well that the funds should be kept so that both or all the executors shall exercise control or supervision thereof together. Where such is the case, any person dealing with them is bound upon notice to recognize their joint title.<sup>5</sup>

402. **In administering the assets, each co-executor is often held responsible for the safety of the fund, so as not to be utterly excused**

<sup>1</sup> *Bodley v. McKinney*, 9 Sm. & M. 339; *Barry v. Lambert*, 98 N. Y. 300, 50 Am. Rep. 677.

<sup>2</sup> But courts of equity and probate decline to sustain imprudent, unjust or dishonest acts of this character, as against the co-executor, even though the transferee's title may remain undisturbed. *Lepard v. Vernon*, 2 Ves. & B. 51; *Sneesby v. Thorne*, 7 De G. M. & G. 399; *Wms. Exrs.* 948; 53 How. (N. Y.) Pr. 286. See as to aid in equity, *Giddings v. Butler*, 47 Tex. 535.

<sup>3</sup> 2 Pars. Sel. (Pa.) 153; *Wood v. Brown*, 34 N. Y. 337; *Hall v. Carter*, 8 Ga. 388. The act of one, in possessing himself of assets, is the act of all, so as to entitle them to a joint interest in possession, and a joint right of action if they are afterwards taken away. *Nation v. Tozer*, 1 Cr. M. & R. 174, *per Parke*, B.

<sup>4</sup> *Berry v. Tait*, 1 Hill (S. C.) 4; *Faulkner v. Faulkner*, 73 Mo. 327.

<sup>5</sup> Thus, if they open a joint account with a banker, with checks to be signed by both or all. *De Haven v. Williams*, 80 Penn. St. 480, 21 Am. Rep. 107. And see 50 La. Ann. 382, 23 So. 373, 69 Am. St. Rep. 436. Where assets are kept in a safe deposit box, it may be prudent to have a lock requiring the use of joint keys.

One of two executors cannot assign or indorse over a negotiable note made to them both, as executors, for a debt due to their testator. 9 Mass. 334. And the modern course of authority does not permit a co-executor to bind the others personally by his new promise to pay in future even a debt of the estate; and such a promise, or an admission of indebtedness, cannot be received in evidence against his co-executors. *Tullock v. Dunn*, Ry. & Moo. 416; 12 M. & W. 509. *Forsyth v. Ganson*, 5 Wend. 558, 21 Am. Dec. 241; 5 Barb. 398. See as to a promissory note by one representative alone. 21 N. Y. Supr. 86; (1897) 2 Ch. 181; 293, *supra*. As to whether the new promise of one executor can bind the estate, however, the decisions are found discordant in jurisdictions where a positive rule fixed by the legislature is wanting. See *Shreve v. Joyce*, 36 N. J. L. 44, 13 Am. Rep. 417, where it is held that it can. And see 16 Mass. 431; *Cayuga Co. Bank v. Bennett*, 5 Hill, 236. But the promise of one will not avail against the estate in some States. *Peck v. Bottsford*, 7 Conn. 172, 18 Am. Dec. 92; *Reynolds v. Hamilton*, 7 Watts, 420. And see 12 M. & W. 509; Stat. 9 Geo. IV, c. 14, § 1, in restraint of such sole promises. As to co-executors carrying on under the will a partnership business, see 54 N. J. Eq. 127, 33 A. 194. All the executors who have qualified ought to join in executing a testamentary power of sale or purchase. *Wilson v. Mason*, 158 Ill. 304, 42 N. E. 134, 49 Am. St. Rep. 162; 56 S. E. 865, 144 N. C. 192. The local code should be consulted.

from losses incurred by the carelessness or misconduct of his fellow.<sup>1</sup> A dishonest, unauthorized, or imprudent sale, transfer, or investment is no more to be sanctioned where the executorship is joint than where it is sole.<sup>2</sup> And, inasmuch as each executor has an independent right to control and transfer the assets, one is bound not to be heedless as to his co-executor's conduct, but rather, as in requiring a joint deposit or transfer, or joint investment of funds, to impose a check upon the other's authority. For, if an executor, by any act or default on his part, places the estate and its management in the exclusive power of his co-executor, he takes the perils of the latter's maladministration upon himself, unless he honestly exercised what American courts would call ordinary prudence.<sup>3</sup>

<sup>1</sup> De Haven v. Williams, 80 Penn. St. 480, 21 Am. Rep. 107.

<sup>2</sup> 53 How. (N. Y.) Pr. 286; 4 Redf. (N. Y.) 402; Case v. Abell, 1 Paige, 393.

<sup>3</sup> See *supra*, 315. The English cases may consistently treat the co-fiduciary as one without recompense, and hence, as required rather to exercise slight prudence, like a gratuitous bailee, or so as not to be in "wilful neglect or default." *Ib.* As where an executor delivers or assigns securities to his co-executor in order to enable the latter to receive the money alone. *Candler v. Tillett*, 22 Beav. 236. Or draws or indorses in his favor a bill or note to a similar end. 2 Bro. Ch. 114; *Hovey v. Blakeman*, 4 Ves. 608. Or leaves him free to negotiate a transfer or make a sale at his sole discretion, or gives him a power of attorney on his own behalf, thereby deputing his own control and supervision. *Clough v. Dixon*, 3 M. & C. 497; 19 Beav. 412; *Edmonds v. Crenshaw*, 14 Pet. 166, 10 L. Ed. 402; *Sparhawk v. Buell*, 9 Vt. 41; *Wood v. Brown*, 34 N. Y. 337; *Heath v. Allin*, 1 A. K. Marsh. 442; *Head v. Bridges*, 67 Ga. 227. Or where he neglect unreasonably enforcing the payment of a debt which his co-executor owed the estate, and was legally bound to pay. *Styles v. Guy*, 1 Mac. & G. 422; 22 Beav. 257; *Carter v. Cutting*, 5 Munf. 223. Or allows his co-executor to gain undue advantage over other creditors. *McCormick v. Wright*, 79 Va. 524. And see *Knight v. Haynie*, 74 Ala. 542. But, if he can show that his own conduct was within the usual rule of prudence and good faith, under all the circumstances, and that he did not contribute to the loss, upon such a standard of liability, he is excused; for the cardinal doctrine is that co-executors are liable each for his own acts and conduct, and not for the acts or conduct of his co-executors. *Cro. Eliz.* 318; *Wms. Exrs.* 1820; *Williams v. Nixon*, 2 Beav. 472; *Peter v. Beverly*, 10 Pet. 532, 9 L. Ed. 522; *Brigham v. Morgan*, 69 N. E. 418, 185 Mass. 27; 11 John. 16; *Fennimore v. Fennimore*, 2 Green Ch. 292; *Ames v. Armstrong*, 106 Mass. 18; 3 Bibb, 97; *Williams v. Maitland*, 1 Ired. Eq. 92; *Kerr v. Water*, 19 Ga. 136; *Call v. Ewing*, 1 Blackf. 301. Putting assets into sole control of one executor may be justified in course of business. (1894) 1 Ch. 470.

At common law the acts of each executor within the scope of his authority are, as concerns administration, the acts of all, with this qualification: that at common law each was responsible only for such assets as came to his own hands. Under ordinary circumstances, one of two or more executors was not to be held accountable for waste or other misconduct on his associate's part; and his misplaced confidence in the latter's integrity and capacity was not allowed to operate to his own prejudice. But the development of this doctrine in courts of equity appears to have established the rule of the present day upon a somewhat different footing, as the text indicates; the question coming to be regarded, in view of the great extent to which any one of them could practically control and dispose of assets, rather as involving the element of *contributory negligence or fraud*, on the part of the executor who claims immunity. And the view taken by courts of probate and equity, in passing upon the accounts of executorship, becomes more and more the material one in such cases. See *Ames v. Armstrong*, 106 Mass. 18. *Wms. Exrs.* 1822-1826, discusses this subject with English citations. See 321, 323, *supra*. And cf. local code.

Thus, failing to withdraw money from a banker, who happens to turn out insolvent, does not necessarily charge a co-executor, nor indeed a sole executor; and so with changing investments, originally justifiable, but which eventually prove unfortunate; or confiding in some agent or a co-executor who abuses the confidence placed in him. *Worth v. McAden*, 1 Dev. & Bat. Eq. 199; *Adair v. Brimmer*, 74 N. Y. 539. But to intrust large sums and large authority to one notoriously insolvent or irresponsible is a very different matter. The question reverts, in short, to the customary issue of good faith and prudence, considering all the circumstances, as in the case of a sole executor or administrator. And this issue becomes crucial in a case where one executor actively manages, while the other is passive. See *Cocks v. Haviland*, 124 N. Y. 426, 26 N. E. 976.

The understanding of all concerned may have something to do with reducing liability, where the circumstances appear to have justified reliance upon one of the co-executors alone as sole manager. *English v. Newell*, 42 N. J. Eq. 76, 6 A. 505. But cf. *Earle v. Earle*, 93 N. Y. 104. As to the peculiar confidence naturally reposed in one by reason of his profession or superior knowledge, see 4 Dem. 528. Where one undertakes sole management against the other's wishes there should be a dissent. *Cheever v. Ellis*, 108 N. W. 390, 144 Mich. 477, 11 L. R. A. (N. S.) 296; *Adams, Re*, 59 N. E. 1118, 166 N. Y. 623; *Irvine's Estate*, 53 A. 502, 203 Penn. 602. See 79 Va. 524; 69 N. E. 418, 185 Mass. 27.

A co-executor who joins in a receipt is bound by the consequences, to the usual extent of requiring prudence and good faith; but the act of so joining, though *prima facie* importing that the money came to the hands of both, is not conclusive evidence, but may be explained so as possibly to exonerate him. Where the act itself is such that all the executors must join in it, a court may treat it as not imprudent for one to rely upon the assurance that no transfer or misappropriation can be made without his concurrence in the act. Thus would it be, for instance, where a power was vested in both under the will. *Smith v. Moore*, 6 Dana, 417; *Bank v. Baugh*, 9 Sm. & M. 290; *Kling v. Hummer*, 2 Pa. 349; *Carroll v. Stewart*, 4 Rich. 200; *County v. Day*, 57 S. E. 359, 128 Ga. 156; 56 S. E. 865, 144 N. C. 192, 10 L. R. A. (N. S.) 867. See *Hart v. Rust*, 46 Tex. 556; *Adair v. Brimmer*, 74 N. Y. 539. Or where stock cannot be transferred except by the signatures of all. *Chambers v. Minchin*, 7 Ves. 197; *Hovey v. Blakeman*, 4 Ves. 608. See local statute. Or where both must join in a petition. 40 N. J. Eq. 173. Or where the indorsement or assignment of some specific instrument requires the joint assent; or where the fund is deposited so as to remain subject to their joint check. *De Haven v. Williams*, 80 Penn. St. 480, 21 Am. Rep. 107. See *Child v. Thorley*, L. R. 16 Ch. D. 151. See 5 Dem. 414 (statute). Even thus, culpable carelessness in permitting the proceeds of the sale, or transfer, or assignment, to be paid to one, or the joint check collected by himself alone, might charge the co-executor who confided too imprudently in his associate. *Croft v. Williams*, 23 Hun (N. Y.) 102. For funds he suffers to be left unreasonably long in his co-executor's hands, or loans to him, the executor is responsible if they are misapplied, though as far as they are duly applied in the course of administration he is indemnified. *Scurfield v. Howes*, 3 Bro. Ch. 91; 1 My. & Cr. 8; 11 Ves. 252; 23 Hun (N. Y.) 102; 4 Beav. 427; *Hays v. Hays*, 3 Tenn. Ch. 88. One executor has no right to rely upon the representations of his associate, but is bound to use due diligence in ascertaining for himself whether those representations are true. *Chambers v. Minchin*, 7 Ves. 197; 11 Ves. 254; *Clark v. Clark*, 8 Paige, 152, 35 Am. Dec. 676. See *Atcheson v. Robertson*, 3 Rich. Eq. 132, 55 Am. Dec. 634. And one may become privy to a misapplication of funds by his co-executor, so as to become liable, when he tacitly suffers it to be done without making a remonstrance. *Whitney v. Phoenix*, 4 Redf. (N. Y.) 180; 15 Abb. Pr. N. S. 457. For the act of one executor may be considered as adopted by his co-executor, when the latter's conduct virtually amounts to an assent, however reluctantly given. Cases *supra*; *Nelson v. Carrington*, 4 Munf. 332, 6 Am. Dec. 519. As a rule each of two or more co-executors has full power of administration. See as to a debtor's *bona fide* payment to one, *Stone v. Union Savings Bank*, 13 R. I. 25; *Hyatt v. McBurney*, 18 S. C. 199 (voucher given up). And each is *prima facie* liable for the entire amount shown to be due on their joint account. *Cassel's Estate*, 180 Penn. St. 252, 36 A. 744. Cf. *Duncan v. Dawson*, 40 N. J. Eq. 535; 50 N. J. Eq. 8; *Young's Appeal*, 99 Penn. St. 74.

403. All executors should join in bringing actions on behalf of the estate, and correspondingly should be sued together.<sup>1</sup> As a rule, co-executors cannot sue or be sued at law, by one another.<sup>2</sup> But here, as elsewhere, we speak of co-executors in the modern

In short, an executor who, by his culpable negligence or fraud, suffers his co-executor to waste the estate, participates in the breach of trust so as to render himself liable to the beneficiaries. *Holcombe v. Holcombe*, 13 N. J. Eq. 413; *Hengst's Appeal*, 24 Penn. St. 413; *McDowall v. McDowall*, 1 Bailey Eq. 324; *Adair v. Brimmer*, 74 N. Y. 539; *Anderson v. Earle*, 9 S. C. 460; 98 Ga. 310, 24 S. E. 437. And each case of this kind must depend largely upon its own peculiar circumstances, taking into account the apparent knowledge and acquiescence of one executor in the acts and transactions of the other, and the power and control which the former may have deliberately permitted the latter to exercise. *Blake v. Pegram*, 109 Mass. 541; *Fonte v. Horton*, 36 Miss. 350; *Clarke v. Blount*, 2 Dev. Eq. 51; *Adair v. Brimmer*, 74 N. Y. 539; *Wilmerding v. McKesson*, 103 N. Y. 329, 8 N. E. 665; *Tompkins v. Tompkins*, 18 S. C. 1 (foreign sale transaction); *Cheever v. Ellis*, and other cases, *supra*. And for wrongful knowledge and connivance at his co-executor's misconduct he is more strongly answerable than for carelessness with honest intent. *Wilmerding v. McKesson*, 103 N. Y. 329, 8 N. E. 665.

But one of several executors has no inherent authority to borrow money without the assent of the others; nor is such assent to be assumed from the fact that the loan procured was for the benefit of the estate. *Bryan v. Stewart*, 83 N. Y. 270. Nor can one alone create a pecuniary liability by his purchase. *Scruggs v. Driver*, 13 Ala. 274. For assets coming to his secret possession, one co-executor alone ought *prima facie* to be held accountable. *Hawkins v. Day*, Amb. 162. In general, therefore, where an executor performs acts outside the usual scope of authority incidental to administration, thereby rendering himself and not the estate immediately liable, it can usually impute no blame to his co-executor, who was ignorant thereof, that the latter took no precaution to save the estate from loss; and hence, such co-executor is not to be held responsible, unless, at all events, he was culpably careless in procuring knowledge of the transaction, or in acting upon such knowledge after he had gained it. Directions in a will, which vest a peculiar confidence and control of assets in one of the executors, may be set up by the co-executor as relieving him specially of an abuse by the other which was without his own participation. *Vanpelt v. Veghte*, 14 N. J. L. 107. Where the testamentary functions are divided by the will, and each confines himself to his allotted functions, the liability appears to be several and not joint. *Girod v. Pargoud*, 11 La. Ann. 329. But co-executors are not authorized to divide the management of the estate between themselves with the responsibility. *Birmingham v. Wilcox*, 120 Cal. 467, 52 P. 822. Cf. as to a surcharge, *Mueller's Estate*, 190 Penn. St. 601, 42 A. 1021.

<sup>1</sup> *Wms. Exrs.* 956, 1867; *Bodle v. Huise*, 5 Wend. 313. Advantage should be taken of non-joinder, however, by a plea in abatement. 1 *Saund.* 291; *Packer v. Willson*, 15 Wend. 343. But by modern practice only executors who qualify and receive the probate credentials shall be sued or sue. *Davies v. Williams*, 1 Sim. 8; *Thompson v. Graham*, 1 Paige, 384; *Rinehart v. Rinehart*, 15 N. J. Eq. 44; *Heron v. Hoffner*, 3 Rawle, 393; *Alston v. Alston*, 3 Ired. 447; *Wms. Exrs.* 286; Act 20 & 21 Vict. c. 77, § 79. Co-executors, when sued, may plead differently. *Wms. Exrs.* 1942; 1 *Stra.* 20; *Geddis v. Irvine*, 5 Penn. St. 308. The release of one co-executor from liability does not discharge the other, especially if the latter be the real party to blame. 74 Cal. 199, 15 P. 753. But if one executor contracts alone on his own account, it would appear that he must sue alone on such contract, notwithstanding the proceeds recovered will be assets. *Heath v. Chilton*, 12 M. & W. 632. And upon a sale of assets made by himself alone, he doubtless may sue for the price, not naming himself executor. *Brassington v. Ault*, 2 Bing. 177; *Wentw. Off. Ex.* 224; *Wms. Exrs.* 911; *Aiken v. Bridgman*, 37 Vt. 249; *Laycock v. Oleson*, 60 Ill. 30. So, if goods be taken out of one's sole possession. *Wms. Exrs.* 1869. See 281, *supra*.

<sup>2</sup> *Wms. Exrs.* 957.

sense, that they have all accepted and qualified themselves for the trust, and we assert a common-law rule.<sup>1</sup>

404. In respect of rights, duties, and liabilities, co-administrators stand upon the same footing as co-executors; with, of course, the difference that their functions, being defined by general and positive law, are scarcely capable of special variation. Co-administrators are to be regarded in the light of an individual person. Their interest is joint and entire; the acts of one in respect of administration are taken to be the acts of all;<sup>2</sup> and as to liability for one another's acts, the doctrine corresponds to that of co-executorship.<sup>3</sup>

405. Survivorship among co-executors or co-administrators exists without new letters, where one dies or vacates office.<sup>4</sup>

<sup>1</sup> Cf. 2 Litt. 314; *Martin v. Martin*, 13 Mo. 36; *Dorchester v. Webb*, W. Jones, 345; 19 Barb. 631. In equity, contrary to the rule of law, one executor may sue another; and courts of equity will entertain such proceedings for the purpose of making a delinquent executor liable to his co-executor, to force an account, to complete the foreclosure of a mortgage, and otherwise where justice requires it, and there is no adequate redress at law. *Peake v. Ledger*, 8 Hare, 313; *Case's Appeal*, 35 Conn. 117; *Wms. Exrs.* 1911; 151 Fed. 159; *Storms v. Quackenbush*, 34 N. J. Eq. 201; *McGregor v. McGregor*, 35 N. Y. 218; 35 N. J. Eq. 374; 4 N. J. L. 189; 56 N. J. Eq. 102, 38 A. 297; 4 Dem. 364. But not where the party who comes into equity has a bad standing. *Bowen v. Richardson*, 133 Mass. 293; *King v. Shackelford*, 13 Ala. 435. See further, as to relieving or preventing maladministration, *Nason v. Smalley*, 8 Vt. 118; *Elmendorf v. Lansing*, 4 Johns. Ch. 562; *Sheehan v. Kennelly*, 32 Ga. 145.

A desirable course, in modern probate practice, where a co-executor misbehaves or becomes unsuitable for the trust, is to procure his removal or resignation. See *supra*, 154; *Hesson v. Hesson*, 14 Md. 8. See as to local practice, 1 *Thomp. & C. (N. Y.)* 277; 1 *Stew. (Ala.)* 71.

<sup>2</sup> *Bryan v. Thompson*, 7 J. J. Marsh. 587; *Gage v. Johnson*, 1 McCord, 492; *Murray v. Blatchford*, 1 Wend. 583, 19 Am. Dec. 537; *Rick v. Gilson*, 1 Penn. St. 54; *Sanders v. Blain*, 6 J. J. Marsh. 446, 22 Am. Dec. 86. And see *Gulledge v. Berry*, 31 Miss. 346; *supra*, 400-403.

<sup>3</sup> *Johnson v. Corbett*, 11 Paige, 265; 18 Barb. 24; *Wms. Exrs.* 950. See *Gordon v. Finlay*, 3 Hawks, 239. An agreement between co-administrators that one of them alone shall manage the estate is void. *Wilson v. Lineberger*, 94 N. C. 641, 55 Am. Rep. 628. Joint administration is a trust never to be forced upon persons unwilling to serve together. *Brubaker's Appeal*, 98 Penn. St. 21. And see 402.

<sup>4</sup> *Flanders v. Clarke*, 3 Atk. 509; *supra*, 400; *Shelton v. Homer*, 5 Met. 462 (removal or resignation); *Wms. Exrs.* 911, 951; 41, *supra*; *Anderson v. Stockdale*, 62 Tex. 54. Except as affected by provision in the will. *Mulford v. Mulford*, 42 N. J. Eq. 68, 6 A. 609. So, too, as to exercising a testamentary power. *Brassey v. Chalmers*, 16 Beav. 231; S. C. 4 De G. M. & G. 528; *Wms. Exrs.* 954; *Gould v. Mathers*, 104 Mass. 283. Cf. *Granville v. McNeile*, 7 Hare, 156. If the power is conferred upon co-executors in their official capacity and not by name as individuals, the disqualification of one leaves the power in the other. 54 N. J. Eq. 108. See further, 11 M. & W. 630; 5 Gray, 341; *Peter v. Beverly*, 10 Pet. 532, 9 L. Ed. 522. But as to executing a power in favor of a co-executor who renounces, see 1 Bing. 50; *Shelton v. Homer*, *supra*. Moving from the State and ceasing to participate actively does not vacate the office nor end one's duties as to joint acts requisite. 57 S. E. 359, 128 Ga. 156; 56 S. E. 865, 144 N. C. 192, 10 L. R. A. (N. S.) 867.

406. **Where co-executors or co-administrators qualify by giving bond to the judge of probate**, as they are usually in modern practice compelled to do before letters can issue to them,<sup>1</sup> the form of the bond executed may affect very seriously their liability, and that of their sureties, to persons interested in the estate.<sup>2</sup>

407. (2) **As to the rights, duties, and liabilities of an administrator with the will annexed.** From what has been elsewhere said,<sup>3</sup> it may be gathered that such rights and duties of an executor as result from the nature of his office must devolve upon an administrator with the will annexed; not, however, an authority necessarily connected with some personal trust and confidence reposed in the executor by the testator.<sup>4</sup>

The personal representative of a deceased or vacating co-executor cannot, according to the old rule of common law, be sued by his survivor in the trust, for a debt due to their testator, nor in respect to a breach of trust. *Wms. Exrs.* 957. But our modern practice acts relax this doctrine to a considerable extent. *Hendricks v. Thornton*, 45 Ala. 299. Redress is granted by equity in various instances, on behalf of the surviving executor or executors who are innocent of wrong. See, as to breach of trust by the deceased executor, *Miles v. Durnford*, 2 De G. M. & G. 641; *Turner v. Wilkins*, 56 Ala. 173. And see *Chew's Appeal*, 2 Grant (Pa.) 294. And see as to compelling account by the survivor, *Huff v. Thrash*, 75 Va. 546; *Fitzsimmons v. Cassell*, 98 Ill. 332. Cf. *Whiting v. Whiting*, 64 Md. 157, 20 A. 1030.

<sup>1</sup> *Supra*, 145.

<sup>2</sup> Co-executors or co-administrators, who give a joint and several bond, render themselves jointly and severally liable as principals for waste committed by either while the joint relation continues, though without fault upon the part of both, and for the proper administration of all assets which come to their possession and knowledge. *Brazer v. Clark*, 5 Pick. 96; *Hughlett v. Hughlett*, 5 Humph. 453; *Newton v. Newton*, 53 N. H. 537; *Marsh v. Harrington*, 18 Vt. 150; *Pearson v. Darrington*, 32 Ala. 227. Nor can one allege that the other took exclusive possession, and that no assets came into his own hands. *State v. Hyman*, 72 N. C. 22. See also *Bostick v. Elliott*, 3 Head. 507. Chancery will enforce, where it may, a just contribution as between the joint executors in all such cases. *Marsh v. Harrington*, 18 Vt. 150; *Conner v. McIlvaine*, 4 Del. Ch. 30; *Garnett v. Macon*, 6 Call. 308; *Turner v. Wilkins*, 56 Ala. 173. The representatives of one joint executor are not in any form responsible for maladministration of the survivor happening after the decease of the former, under such a bond. *Brazer v. Clark*, *supra*. And see 20 Pick. 535. All such joint parties are responsible each for the acts of the other, before the sureties on their joint bond. *Jamison v. Lillard*, 12 Lea, 620. When two or more execute a joint bond, they stand in the relation of principal and surety; each as principal *quoad* his own acts, and as surety *quoad* the transactions of others. 76 Va. 85.

Neither co-executors nor co-administrators, however, are compelled to give a joint bond; they may give either separate or joint bonds at their discretion, as the statutes of various States expressly permit; and the effect of giving a separate bond is to leave each co-executor or co-administrator simply liable for his own default or misconduct, under the qualifications already set forth. See local code; 124 N. Y. 1, 26 N. E. 331 (suit by survivor upon bond of co-executor removed from trust). And see Part II, c. 5.

<sup>3</sup> *Supra*, 123.

<sup>4</sup> 4 Mass. 634; *Bain v. Matteson*, 54 N. Y. 663; *Syme v. Broughton*, 86 N. C. 153; 57 N. E. 1117, 161 N. Y. 634. Thus, a discretionary power to sell lands given to one's executor will not presumably vest in the administrator with the will annexed, whether the executor expressly named died, renounced, or failed, from some reason, to qualify, or no executor was named at all. *Nicoll v. Scott*, 99 Ill. 529; *Lucas v. Doe*, 4 Ala. 679; 3 A. K. Marsh. 380, 13 Am. Dec. 187; *McDonald v. King*, 1 N. J. L. 432; *Conklin v.*

408. (3) **As to the rights, duties, and liabilities of an administrator *de bonis non*.**<sup>1</sup> Whether administration *de bonis non* is taken upon a testate or intestate estate, there is, in respect of powers and responsibility, no essential difference of principle; only that, in the former instance, the administration of the estate becomes completed by one whose scope of authority is that of administrator with the will annexed, and, in the latter, by a simple administrator. The grant of administration *de bonis non* confers upon the person so appointed a legal title to all the goods, chattels, rights, and credits of the deceased, which were left unadministered by his predecessor.<sup>2</sup>

Egerton, 21 Wend. 430; 25 ib. 224; Belcher v. Belcher, 11 R. I. 226; Knight v. Loomis, 30 Me. 204; Vardeman v. Ross, 36 Tex. 111; Hall v. Irwin, 2 Gilm. 176 (executor not named). There are local statutes, however, which change this rule more or less specifically. 2 Ired. Eq. 330; 6 Rand. 594; Keefer v. Schwartz, 47 Penn. St. 503; Evans v. Blackiston, 66 Mo. 437. And the intent of the will must control. Jones v. Jones, 2 Dev. Eq. 387. See 7 Heisk. 315; 32 Cal. 436. So, where property is bequeathed to one's executors, to be held personally in trust for specified objects. Brush v. Young, 28 N. J. L. 237. So as to carrying on the testator's business under a personal testamentary power. Warfield v. Brand, 13 Bush. 77. And see Rubottom v. Morrow, 24 Ind. 202, 87 Am. Dec. 324. Otherwise as to sale to pay debts. Dunning v. Ocean Nat. Bank, 61 N. Y. 497, 19 Am. Rep. 293. And see Cohea v. Johnson, 69 Miss. 46, 13 So. 40. And see 413, *post*. In short, where a power is confided officially to one's executor or is an incident of his official duty, an administrator with the will annexed may exercise it; but a purely personal trust and confidence reposed in the executor, actually named, cannot be exercised by his legal substitute.

As to his authority to administer upon any portion of the estate not disposed of by the will, see Harper v. Smith, 9 Ga. 461; Syme v. Broughton, 86 N. C. 153; Owens v. Cowan, 7 B. Mon. 152; Sm. & M. 151; 4 Binn. 31, 5 Am. Dec. 385; 1 Bailey Eq. 392; Perry v. Gill, 2 Humph. 218. *Contra*, Sullivan v. Fosdick, 17 N. Y. Supr. 173, 72 Am. Dec. 442. See May v. Brewster, 73 N. E. 547, 187 Mass. 524.

As to the liability of such administrator and his sureties upon the bond given, see Murphy v. Carter, 23 Gratt. 477; Strother v. Hull, ib. 652. For the liability of co-administrators with the will annexed, see 402; Adams v. Gleaves, 10 Lea, 367, 44 Am. Dec. 469. See further, 2 Bradf. 22. And cf. local code.

<sup>1</sup> See *supra*, 128, as to the appointment of such administrators.

<sup>2</sup> Wms. Exrs. 915, 961; 1 Salk. 306; 7 Humph. 141; 9 Ala. 908, 44 Am. Dec. 469; Paschall v. Davis, 3 Ga. 256; American Board's Appeal, 27 Conn. 344; 4 Fla. 56; Gilbert v. Hardwick, 11 Ga. 599; Newhall v. Turney, 14 Ill. 338; Shawhan v. Loffer, 24 Iowa, 217; Carroll v. Connet, 2 J. J. Marsh. 195; 8 Gill & J. 226; Harney v. Dutcher, 15 Mo. 89; 13 Sm. & M. 373, 55 Am. Dec. 131; 4 E. D. Smith, 519; 3 Rawle, 361, 24 Am. Dec. 359; Bell v. Speight, 11 Humph. 451; Merriam v. Hemmenway, 26 Vt. 565.

All the personal estate which has not already been administered, but remains capable of identification, belongs to the administrator *de bonis non* specifically. Such property whether of the corporeal or incorporeal kind he may recover; and so, too, funds deposited by his predecessor in the name of the estate. Stair v. York Nat. Bank, 55 Penn. St. 364, 93 Am. Dec. 759. And so, too, apparently, with identified investment securities taken for the estate by his predecessor. King v. Green, 2 Stew. 133, 19 Am. Dec. 46. *Contra*, 7 J. J. Marsh. 188. But where the former representative has mingled it with his own property, a conversion—or what is called "administration"—takes place, so that only the value thereof can be recovered, and the administrator *de bonis non* becomes a creditor, with no preference, so to speak, but secured by his predecessor's official bond. Beall v. New Mexico, 16 Wall. 535, 21 L. Ed. 292; Wms. Exrs. 916;

409. This administrator derives title as to the unadministered assets, not from the former executor or administrator, but from the deceased.<sup>1</sup> And the occasion which calls for his appointment forces him often into antagonism with his predecessor or his predecessor's representatives, to rescue the estate from maladministration and pursue the remedies available for his predecessor's breach of trust.<sup>2</sup>

34 Ark. 144; 7 Mo. 469; *Hodge v. Hodge*, 90 Me. 505, 60 Am. St. Rep. 285; 153 Penn. St. 345, 25 A. 1119. See *Wilson v. Arrick*, 112 U. S. 83 (agent). An action will not lie at common law against the predecessor for the recovery of assets converted by him; nor, as it is held, has the administrator *de bonis non* any right to call for an account of any part of the estate sold, converted, or wasted by his predecessor, since it is not "unadministered." 9 Leigh, 580; *Smith v. Carrere*, 1 Rich. Eq. 123; *Stubblefield v. McRaven*, 5 Sm. & M. 130, 43 Am. Dec. 502; *Oldham v. Collins*, 4 J. J. Marsh. 49; *Beall v. New Mexico*, 16 Wall. 540, 21 L. Ed. 292; *Rowan v. Kirkpatrick*, 14 Ill. 8; *Stose v. People*, 25 Ill. 600; *Wms. Exrs.* 539, 915; *Johnson v. Hogan*, 37 Tex. 77; *Young v. Kimball*, 8 Blackf. 167; *Thomas v. Stanley*, 4 Sneed, 411; *Stronach v. Stronach*, 20 Wis. 129. Hence, the stricter practice is for the distributees or creditors to the original decedent, or others in interest, and not the administrator *de bonis non* of the estate, to seek an account and to prosecute the bond or the representatives of a deceased predecessor in the trust, in respect of his maladministration. But this old rule applied literally, however, where the former executor or administrator had died in the office; and modern statutes, not unfrequently permit of a different rule for other cases, such as removal or resignation of one's predecessor. *Marsh v. People*, 15 Ill. 284. Or even as against the personal representatives of a deceased predecessor. 4 Abb. (N. Y.) App. 512; *Knight v. Lasseter*, 16 Ga. 151; *Tracy v. Card*, 2 Ohio St. 431; *Palmer v. Pollock*, 26 Minn. 433, 4 N. W. 1113; *Carter v. Trueman*, 7 Penn. St. 320. Cf. 109 U. S. 258, 27 L. Ed. 927. See also *Beall v. New Mexico*, 16 Wall. 540, 21 L. Ed. 292, criticising *Wms. Exrs.* 539 (deceased predecessor); *supra*, 157. See *Gray v. Harris*, 43 Miss. 421 (form of decree); 113 N. W. 571.

The unadministered property vests in the administrator *de bonis non* for completing the proper settlement of the estate. A balance due from the predecessor, whether rendered voluntarily by the predecessor himself, or by his representative in case of his death, or obtained by a suit on the predecessor's probate bond, belongs by right to the successor as assets, and should be paid into his hand. *Wiggin v. Swett*, 6 Met. 197, 39 Am. Dec. 716; *Palmer v. Pollock*, 26 Minn. 433, 4 N. W. 1113; 24 Neb. 712, 40 N. W. 137. He is preferred to a creditor of his predecessor in reaching a fund which is properly assets. *Marvel v. Babbitt*, 143 Mass. 226, 9 N. E. 566. And he should inventory at their just valuation, and account under his bond for all chattels belonging to the decedent's estate which his predecessor has not properly sold or disposed of, and which still exist in identity, pursuing them or their value. *Fay v. Muzzey*, 15 Gray, 53, 56, 77 Am. Dec. 350; *Burnley v. Duke*, 2 Rob. (Va.) 102; *Miller v. Alexander*, 1 Hill Ch. (S. C.) 499 (a balance improperly used). See *Piatt v. St. Clair*, 5 Ohio, 556; *supra*, 128, as to granting such administration for the protection of distributees, etc. In 21 Neb. 233, 31 N. W. 739, an administrator was removed who owed the estate \$12,000; the sole surety on his bond for \$10,000 was appointed administrator *de bonis non*; and it was held that the latter must charge himself with the \$10,000 as assets. See *supra*, 208.

<sup>1</sup> *Catherwood v. Chabaud*, 1 B. & C. 154; *Weeks v. Love*, 19 Ala. 25; *Bell v. Speight*, 11 Humph. 451; *American Board's Appeal*, 27 Conn. 344; *Bliss v. Seaman*, 165 Ill. 422, 46 N. E. 279; *supra*, 128; *Wms. Exrs.* 961.

<sup>2</sup> He may get back personalty of the estate, or its proceeds, wrongfully delivered by the former executor or administrator, and still held as a fund capable of identification. *Stevens v. Goodell*, 3 Met. 34; *Fay v. Muzzey*, 13 Gray, 53, 74 Am. Dec. 619. Local codes define to some extent the rights and liabilities of an administrator *de bonis non*. See *Slaymaker v. Farmers' Bank*, 103 Penn. St. 616; *Foster v. Bailey*, 157 Mass. 160, 31 N. E. 771. He may, by proceedings in equity, recover chattels fraudulently and collusively transferred by the predecessor. *Wms. Exrs.* 918, 935;



410. But an administrator *de bonis non* cannot re-open the transactions which his predecessor has completed in fulfillment of his just authority. While he does not represent his predecessor in the same sense as his predecessor represented the decedent, he is bound by his predecessor's acts so far as they were legal and

Cubbidge v. Boatwright, 1 Russ. Ch. Cas. 549; Forniquet v. Forstall, 34 Miss. 87; Cochran v. Thompson, 18 Tex. 652; 66 Tex. 704, 1 S. W. 803. But cf. 2 Hill Ch. (S. C.) 499; Steele v. Atkinson, 14 S. C. 154, 37 Am. Rep. 728 (proceedings by creditors and distributees). He may demand an account in probate or equity against his predecessor and his sureties. Whitaker v. Whitaker, 12 Lea, 393; 67 Vt. 485, 32 A. 473. He may demand and sue for assets of the decedent's estate in the hands of a former executor or administrator, or his representative, or in possession of some third party. Stair v. York Nat. Bank, 55 Penn. St. 364, 93 Am. Dec. 759; Langford v. Mahoney, 4 Dru. & War. 81; Wms. Exrs. 916. He may recover personal property wrongfully pledged or mortgaged, subject to the usual equities. Hendrick v. Gidney, 114 N. C. 543, 19 S. E. 598. He is not estopped by the illegal acts of his predecessor. Bell v. Speight, 11 Humph. 451. And he may pursue the latter, although there are no creditors, and the object of his administration is to protect the rights of heirs and legatees or distributees. Scott v. Crews, 72 Mo. 261; Ham v. Kornegay, 85 N. C. 119. In general, he may institute proceedings, in law or equity, as justice may require, for personal assets which remain unadministered; subject to any just lien claim of his predecessor. See further, Spencer v. Rutledge, 11 Ala. 590; Elliott v. Kemp, 7 M. & W. 306; 7 Ala. 478 (assumpsit for money collected); Sloan v. Johnson, 14 Sm. & M. 47; 20 Ala. 354; Alexander v. Raney, 8 Ark. 324; Kelsey v. Smith, 2 Miss. 68.

The administrator *de bonis non* should not institute proceedings against widow and heirs of a deceased predecessor, but against the predecessor's personal representative. Finn v. Hempstead, 24 Ark. 111. As for proceedings to compel his predecessor to return an inventory, see Gaskins v. Hammett, 32 Miss. 103. And statutes are found which enable him to procure aid in his search from the probate court, or extend and define his remedies. Waterman v. Dockray, 78 Me. 139, 3 A. 49 (suit on bond); Slagle v. Entlekin, 44 Ohio St. 637, 10 N. E. 675; 123 Cal. 437, 56 P. 49; Balch v. Hooper, 32 Minn. 158; 129 Fed. 575; Perrin v. Judge, 49 Mich. 342, 13 N. W. 767.

An administrator *de bonis non* has the power, and is subject to the responsibilities, of an original representative, with respect to the estate left unadministered by his predecessor. He may sue on promises made to a predecessor in his representative capacity. Catherwood v. Chabaud, 1 B. & C. 150; Wms. Exrs. 961; Shackelford v. Runyan, 7 Humph. 141; Stair v. York Nat. Bank, 55 Penn. St. 364, 93 Am. Dec. 759. The final settling up of the estate devolves upon him; and if his predecessor be dead, the latter's representative should do nothing more than close dealings, and deliver over such assets as may still be undisposed of, and the balance remaining on a just accounting, to the administrator *de bonis non*. Ferebee v. Baxter, 12 Ired. 64; Ray v. Daughy, 4 Blackf. 115; Steen v. Steen, 25 Miss. 513. It is the duty, moreover, of an administrator *de bonis non* to assume the defence of an action brought against his predecessor on a contract of the deceased. National Bank v. Stanton, 116 Mass. 438. He may bring a writ of error on a judgment against his predecessor. Dale v. Roosevelt, 8 Cow. 333; Graves v. Flowers, 51 Ala. 402, 23 Am. Rep. 555. He may institute proceedings for foreclosure of a mortgage. Miller v. Donaldson, 17 Ohio, 264; Brooks v. Smyser, 48 Penn. St. 86. Cf. 47 A. 573. For he is successor to all the legal rights and duties which vested in his predecessor as representative of the estate, so far as may be, for procuring assets of the estate as a result. McGuinness v. Whalen, 17 R. I. 619; 61 N. J. Eq. 163; 104 N. C. 180, 10 S. E. 183. Where a representative dies before settling the estate, the administrator *de bonis non* is the proper party plaintiff or defendant in an action which would otherwise be brought by or against the predecessor. Brasfield v. Cardwell, 7 Lea, 252; Russell v. Erwin, 41 Ala. 292; State v. Murray, 8 Ark. 199; North Carolina University v. Hughes, 90 N. C. 537. See further, as to reviving suits brought by predecessor, 7 Dana, 345, 32 Am. Dec. 96; 2 Vern. 237; 2 De G. M. & G. 1.

valid and performed in good faith; while, according to the sounder reason, he is bound no further.<sup>1</sup> And, upon the ground of privity, a successor may be compelled to fulfil his predecessor's agreement for a reasonable and *bona fide* sale of chattels;<sup>2</sup> as, likewise, he may sue in respect of promises and contracts made to his predecessor as a representative, where the proceeds will be assets.<sup>3</sup> How far the administrator *de bonis non* may pursue assets not specifically identified as belonging to the estate is still a matter of question, except in States whose legislation has defined liberally the powers of an administrator *de bonis non*.<sup>4</sup>

411. As to suing a negotiable instrument as concerns administration *de bonis non* there are various decisions.<sup>5</sup>

<sup>1</sup> *Forniquet v. Forstall*, 34 Miss. 87; *Cochran v. Thompson*, 18 Tex. 652; *O'Neill v. Abney*, 2 Bailey, 317; *Martin v. Ellerbe*, 70 Ala. 326. Purchaser's title not disturbed. *Duncan v. Watson*, 28 Miss. 187; *Rice (S. C.) Ch.* 40, 33 Am. Dec. 74. The estate comes to the administrator *de bonis non* subject to a sort of lien in favor of the predecessor to this just extent, and operative for his indemnity accordingly. And see *Teague v. Dendy*, 2 McCord Ch. 207, 16 Am. Dec. 643.

<sup>2</sup> *Hirst v. Smith*, 7 T. R. 182.

<sup>3</sup> *Moseley v. Rendell*, L. R. 6 Q. B. 338. See also *Cock v. Carson*, 38 Tex. 284. And see 7 Gill, & J. 13, 26 Am. Dec. 594; *Alexander v. Raney*, 8 Ark. 324; 46 Ark. 353; 5 T. B. Mon. 19, 17 Am. Dec. 33 (price of goods sold by predecessor); *Matthews v. Meek*, 23 Ohio St. 272 (bond for security).

<sup>4</sup> Under his commission, such an official was rather circumscribed according to the earlier precedents. And while equity exercises a broad authority in modern times for tracing out trust funds, and, notwithstanding the want of earmarks, devoting them to the practical purposes of the trust to which they fairly belonged, a suit instituted meanwhile at common law pursues a narrower line. *Drue v. Baylie*, 1 Freem. 462; *Wms. Exrs.* 918; *Harney v. Dutcher*, 15 Mo. 89, 55 Am. Dec. 131, and cases cited; 40 Mo. 69. Cf. as to equity, 2 Freem. 139; *Skeffington v. Budd*, 3 Y. & Coll. 1; 9 Cl. & Fin. 220. It is not just to maintain individual ownership by the personal representative in all cases of the common law, nor, especially, to allow deposits and securities standing in the name of the trust to be put to paying his individual creditors; and any such conclusion our modern courts of probate and equity, and the legislature besides, will be found to resist. *Stair v. York Nat. Bank*, 55 Penn. St. 364, 93 Am. Dec. 759; *King v. Green*, 2 Stew. 133; *Stevens v. Goodell*, 3 Met. 343. And see 330; 98 N. Y. 511; 1 Const. (S. C.) 676. Much of the legal inconsistency to which modern probate law is exposed arises, doubtless, from the doctrine of modern development which charges the personal representative individually and immediately with his own contract on behalf of the estate, instead of binding directly the estate itself; the rigid consequence proving sometimes beneficial to the estate and sometimes disastrous. For, wherever the administrator *de bonis non* seeks to recover at law, as assets of the estate, a debt founded upon a legal and individual privity between the debtor and his predecessor, he is obstructed in his common-law remedies. See e.g., *Brooks v. Mastin*, 69 Mo. 58.

<sup>5</sup> On the death of A. B., "executor," as holder of a note, the suit is properly revived in the name of his personal representative; at all events, if A. B. held personal possession, and if there be no averment of assets. *Cravens v. Logan*, 7 Ark. 103; *Cook v. Holmes*, 29 Mo. 61, 77 Am. Dec. 548; *Arrington v. Hair*, 19 Ala. 243; *Roy v. Squier*, 48 A. 233, 61 N. J. Eq. 182. See *supra*, 293, as to an original representative's right to sue upon such an instrument. But this rule should not interfere with the right of an administrator *de bonis non* to receive possession of the unadministered assets of the estate he represents; and, accordingly, such administrator is held capable of suing, as such, upon notes or other evidences of debt payable in terms to his predecessor

412. The administrator *de bonis non* is bound to good faith and the usual standard of diligence and care, as regards collecting, procuring, and distributing the assets not already administered; but he is no more an insurer of the estate than a general representative.<sup>1</sup>

413. Upon an administrator *de bonis non* with the will annexed, powers and duties vested in the executor as such devolve generally, as upon an administrator with the will annexed and under like reservations.<sup>2</sup>

414. (4) As to temporary and special administrators, what has already been said in connection with their appointment may sufficiently indicate the scope of powers and liabilities pertaining to these several classes of trusts.<sup>3</sup>

in the administration, as executor or administrator, provided he make proper averment as to the facts, and produce or account for the instrument. *Catherwood v. Chabaud*, 1 B. & C. 150; *Barron v. Vandvert*, 13 Ala. 232; *Burrus v. Roulhac*, 2 Bush, 39. Cf. 69 Mo. 58. It does not follow that because the administrator *de bonis non* may sue, the representative of the original executor or administrator may not sue instead. By Lord Tenterden, in *Catherwood v. Chabaud*, *supra*. Where, by general indorsement and delivery, or otherwise, the note became assets payable to bearer, the administrator *de bonis non* is permitted to sue as holder. *Catherwood v. Chabaud*, 1 B. & C. 150; *Saffold v. Banks*, 69 Ga. 289. Cf. 69 Mo. 58. Where, however, the administrator *de bonis non* cannot produce the instrument as bearer and aver title, an action at law apparently cannot be maintained by him; yet here, on the ground that the administrator *de bonis non* is entitled to the equitable control of the debt and its collection, he may sometimes prosecute his suit in equity. *Burrus v. Roulhac*, 2 Bush, 39.

<sup>1</sup> *Supra*, 315; 37 Ala. 268; *Eubank v. Clark*, 78 Ala. 73. If he faithfully performs his own trust he cannot be made to suffer loss by reason of any predecessor's default; nor is he chargeable for property which, notwithstanding such faithful performance, fails to come into his hands. *Smithers v. Hooper*, 23 Md. 273; *Reyburn v. Ruggles*, 23 Mo. 339; *Weeks v. Love*, 19 Ala. 25. And see *Anderson v. Miller*, 6 J. J. Marsh. 568. The revival of a judgment rendered against the former representative may be made to reach assets in the hands of the successor; but it cannot be made the foundation of a suit against the latter and his sureties as for the successor's waste. *Bliss v. Seaman*, 165 Ill. 422, 46 N. E. 279; *Ruff v. Smith*, 31 Miss. 59; *United States v. Waller*, 109 U. S. 258; 8 Gill & J. 226; *Cover v. Cover*, 16 Md. 1. Consult the local code.

<sup>2</sup> *Blake v. Dexter*, 12 Cush. 559; *supra*, 407. See *Pinney v. Barnes*, 17 Conn. 420; *Knight v. Loomis*, 30 Me. 204; *Ross v. Barclay*, 18 Penn. St. 179; *Warfield v. Brand*, 13 Bush, 77; *Vardeman v. Ross*, 36 Tex. 111; *supra*, 128; *Rubottom v. Morrow*, 24 Ind. 202, 87 Am. Dec. 324; *Ingle v. Jones*, 9 Wall. 486, 19 L. Ed. 621. An administrator *de bonis non* with will annexed has no concern with property to whose use a legatee for life or next of kin is already specifically entitled, under the will. 1 Redf. Sur. 276; *Brownlee v. Lockwood*, 20 N. J. Eq. 239. A direction to executors as executors, and not upon a personal confidence, may be executed by such fiduciary. *King v. Talbert*, 36 Miss. 367; *Olwine's Appeal*, 4 W. & S. 492; 171 Ill. 229, 63 Am. St. Rep. 230, 48 N. E. 974. And see *Mathews v. Meek*, 23 Ohio St. 272; 2 Bibb, 301; *Newsom v. Newsom*, 3 Ired. Eq. 411. Equity must sanction the power in case of doubt. 63 Md. 542. Where the will confers a power of sale of property upon any one legally qualified to administer the estate, this administrator may exercise it. 185 Penn. St. 279, 39 A. 956; *Rollins v. Rice*, 59 N. H. 493; *Cohea v. Johnson*, 69 Miss. 46, 13 So. 40. Cf. *Frisby v. Withers*, 61 Tex. 134. And see 407, *supra*.

<sup>3</sup> *Supra*, 132-135. The general executor or administrator, when qualified, succeeds to the rights of such special administrator. *Cowles v. Hayes*, 71 N. C. 231; *Powell v. Foster*, 71 Vt. 160, 44 A. 96. And, if the latter duly account, and turn over the assets

415. In general, the validity of a personal representative's acts depends on whether they were within the scope of his authority as granted; not on whether he designated himself by one title or another.<sup>1</sup> And this is a principle available for absolving sureties on the representative's official bond, where the latter takes a fund to which he was not legally entitled in his qualified official character.<sup>2</sup>

416. There may be culpable negligence or misconduct by various representatives in succession, so as to charge them accordingly.<sup>3</sup>

or their proceeds to him, having conducted himself with reasonable discretion and honesty, the courts do not appear inclined to permit third parties, and those who dealt with such temporary official, to take advantage of acts committed by him in excess of his authority. See *Von Schmidt v. Bourn*, 50 Cal. 616; *supra*, 190. See as to powers, etc. (which local statute defines largely), 3 Dem. 285; 2 Dem. 264. He may maintain a bill in equity to redeem from a mortgage, under pressing circumstances. *Libley v. Cobb*, 76 Me. 781. But he cannot mortgage real estate of the decedent. *Duryea v. Mackey*, 151 N. Y. 204, 45 N. E. 458. Nor can he make even a partial distribution. 106 Cal. 427, 39 P. 805. See as to statute not unconstitutional, *Ro Bards v. Lamb*, 127 U. S. 802; 135.

<sup>1</sup> Thus, it does not affect the case that one who was only a curator or special administrator, styled himself as a general administrator. *Morgan v. Locke*, 28 La. Ann. 806. And see as to official acting not as public administrator, but as general administrator, 2 Dem. 650; *McCabe v. Lewis*, 76 Mo. 296. As to suing a predecessor, see *State v. King*, 76 Mo. 510.

<sup>2</sup> *Warfield v. Brand*, 13 Bush, 77.

<sup>3</sup> *Johnson v. Molsbee*, 5 Lea, 445. For the rule of determining their respective liabilities in such cases, see *Lacy v. Stamper*, 27 Gratt. 42. The administrator of a surety upon his predecessor's bond may be reached by the suit of the administrator *de bonis non*. *State v. Porter*, 9 Ind. 342.

## PART V.

## PAYMENTS AND DISTRIBUTION.

## CHAPTER I.

## DEBTS AND CLAIMS UPON THE ESTATE.

417. Every executor or administrator is bound to pay the debts, claims, and charges, in legal order of preference, before making any distribution, so far as assets may have reached his hands in due course. This duty is enjoined upon him by law, by his oath and bond, and by a sound public policy. Legatees and distributees, as a rule, are postponed to all such claimants; their satisfaction being out of the surplus, if any, which remains; which surplus, rather than the gross assets, represents the true fortune left by the deceased person.<sup>1</sup> But the paramount authority of a statute which establishes an equality among seasonable creditors of the same degree must be respected.<sup>2</sup>

418. Public notice of appointment, by advertisement or otherwise, within a fixed time, has become a common statute requirement of the executor or administrator.<sup>3</sup> This facilitates the speedy

<sup>1</sup> *McNair's Appeal*, 4 Rawle, 148; *McIntosh v. Humbleton*, 35 Ga. 95, 89 Am. Dec. 276; *Dean v. Portis*, 11 Ala. 104; *Union Bank v. McDonough*, 7 La. Ann. 232; *Hamlin v. Mansfield*, 88 Me. 131, 33 A. 788. But priorities exist even as among legatees, in case of a deficiency. Although this winding up of a deceased person's affairs corresponds considerably to the striking of a balance, such as one might have made with his creditors, were he alive, there are essential points of difference: thus, statutes place special limitations to the presentation of claims against the estate of a deceased person; charges, such as those of funeral and administration, and widow's allowances, are here regarded, in addition to what were strictly debts owing by the deceased; assets are marshalled, moreover, and preferences accorded among debts and charges upon the decedent's estate, after a method peculiar to administration.

<sup>2</sup> No testator can so discriminate of choice among his creditors as to change the legal rules of priority among them in the settlement of his estate. 8 Moore, P. C. 288; *Moore v. Ryers*, 65 N. C. 240; 3 Desau. 16; *People v. Phelps*, 78 Ill. 147. Nor has the probate court any inherent authority to vary the legal rules of priority. *Tompkins v. Weeks*, 26 Cal. 50; *Jenkins v. Jenkins*, 63 Ind. 120; *Thompson v. Taylor*, 71 N. Y. 217. Nor can the usual consequences of delay on the creditor's part, in omitting timely presentment and prosecution of his demand, be averted by general directions in a will, or the order of a probate court. *Collamore v. Wilder*, 9 Kan. 67; 57 Iowa, 353, 10 N. W. 677; 72 Ind. 120. But cf. local code provisions. 39 Iowa, 50; *Miller v. Harrison*, 34 N. J. Eq. 374; *Winegar v. Newland*, 44 Mich. 367, 6 N. W. 841; *Greaves, Re*, 18 Ch. D. 551. And see 66 Vt. 501, 29 A. 810; 448-455, *post*.

<sup>3</sup> *Supra*, 389-391.

settlement of each deceased person's estate, by raising a special legal barrier to claims and limiting the opportunity of creditors to share in assets which have been discovered and brought together; for where the public notice has been duly given, the executor or administrator, as such statutes declare explicitly, cannot be held to answer to the suit of any creditor of the deceased after a specified brief period, save so far as new assets may afterward have come to hand.<sup>1</sup> In this manner claimants are compelled, regardless of the usual rules of limitation, to present their claims upon the estate within six months, one year, or two or more years after letters were granted, according as the local act may prescribe, or else be barred.<sup>2</sup>

<sup>1</sup> For the computation of time in such cases, see the language of the local statute. 11 Conn. 292; 1 Sm. & M. 9; 13 Gray, 336 (affidavit of due notice filed in probate office). See also 13 Mo. 125; 19 Barb. 149; 9 Ired. L. 135. In different States the period of limitations will be found to vary. The form of such notices is usually fixed by statute and standing rules of the probate court; the fact of one's appointment being stated, with a demand upon all persons indebted to make payment, and all persons having claims to present them. 2 Ohio St. 156; 15 Fla. 553.

<sup>2</sup> Cf. the local statute. 75 N. E. 1060, 278 Ill. 580 (not retrospective); 13 Mo. 125; 6 Gill, 430; 1, 2; 9 Ired. L. 135; 44 Conn. 450; Hooper v. Bryant, 3 Yerg. 1. See as to special administrators, with functions limited to collection, etc., 14 Ala. 307. As to an administrator *de bonis non*, see local statute.

Provision is often made for the case of a creditor of the deceased, whose right of action does not accrue within the two years, where the executor or administrator gives statute notice. Bacon v. Pomeroy, 104 Mass. 577; 25 Minn. 22. So for infants in some codes: or the court may extend for "good cause." See 32 Vt. 176, 109 N. W. 942; 130 Wis. 117. Except for such saving provisions, an executor or administrator who has given his notice becomes absolved from liability as such at the expiration of the statute period. 6 Cush. 235; 13 Gray, 559. As to a creditor's bill in equity for relief in such cases, see 2 Allen, 445. And see 107 Iowa, 384, 77 N. W. 1058.

This special barrier operates, notwithstanding an administrator's absence from the State. 6 Ark. 14; 37 Tex. 34; Lowe v. Jones, 15 Ala. 545. It takes effect against non-resident as well as resident claimants, for the policy is to benefit the estate under local jurisdiction. Erwin v. Turner, 6 Ark. 14; 101 Wis. 494, 77 N. W. 883. See also Branch Bank v. Hawkins, 12 Ala. 755; 25 Miss. 501. The executor or administrator is bound to plead such statute. *Supra*, 389. Legatees, heirs, etc., cannot be reached. Cincinnati R. v. Heaston, 43 Ind. 177; 1 Bailey Ch. 437; 12 Iowa, 52. Local statutes provide for admitting later claims which had been deferred with good excuse. 22 Cal. 95. Excuses are recognized in some other instances. North v. Walker, 66 Mo. 453; Senat v. Findley, 51 Iowa, 20, 50 N. W. 575. And see Sampson v. Sampson, 63 Me. 328; 2 Humph. 566; 33 Ala. 258; 7 Fla. 301; 29 Ark. 238. See *post*, 420 as to statute methods of presenting claims. State codes differ. See 8 Sm. & M. 552; 36 N. H. 224; 2 Ind. 174; 10 Tex. 197; 9 How. (N. Y.) Pr. 350. But see 58 Ala. 25; 24 Mo. 527. See also Hammett v. Starkweather, 47 Conn. 439; Lambert v. Craft, 98 N. Y. 342. As to proving a note not yet due, see 122 Ill. 396, 3 Am. St. Rep. 496, 13 N. E. 651; Russell v. Hubbard, 59 Ill. 335; 42 Ind. 485; 58 Tenn. 170. Generally, the same statute barrier applies as to the time for presenting or suing upon a demand against a decedent's estate. Cornes v. Wilkin, 21 N. Y. 428; 6 Cush. 235. See Abbay v. Hill, 64 Miss. 340 (express trust in a will).

Statutes of this character are sometimes considered, not strictly statutes of limitations, but rather special regulations of probate law which impose the loss of the claim if the party fails to sue on it within the time prescribed. Standifer v. Hubbard, 39 Tex. 417. But cf. 1 Ired. Eq. 92.

419. **The claims and demands, whose suit or presentation within the statute period are thus contemplated, appear in general to be, all claims that could be asserted against the estate in a court of law or equity, existing at the time of the death of the deceased, or coming into existence at any time after his death, and before the expiration of the statute period, including claims running to certain maturity, although not yet payable.<sup>1</sup>** But such statutes appear confined usually to demands which accrue against the deceased person, so as not to apply to any demands arising by contract, express or implied, with the executor or administrator himself. For claims of the latter sort, a personal representative has notice and opportunity to provide, so as to save himself harmless; and these are affected by common rules of limitations, and of recoupment or set-off.<sup>2</sup>

420. **Claims upon an estate must be exhibited for allowance and enforced as the local statute directs or indicates.<sup>3</sup>**

<sup>1</sup> *Walker v. Byers*, 14 Ark. 246; 67 Cal. 637, 8 P. 497. The statute barrier has been maintained strenuously against common-law actions brought against the legal representative, which were founded in inchoate and contingent claims, such as dormant warranties and the like, but have not been brought, and could not have been, within the statute period. As in *Holden v. Fletcher*, 6 Cush. 235. And see 13 Gray, 559; 104 Iowa, 264, 73 N. W. 596; *Pico v. De la Guerra*, 18 Cal. 422. An infant's claim is within the statute barrier, or those of others under legal disability. *Williams v. Conrad*, 11 Humph. 412. Under a bill of equity or legislative proviso, such cases of hardship are sometimes, however, overcome. *Garfield v. Bemis*, 2 Allen, 445. And see as to heir or distributee, *Walker v. Byers*, 14 Ark. 246; *Mann v. Everts*, 64 Wis. 372, 25 N. W. 209; *Selover v. Coe*, 63 N. Y. 438. See further, *Gunter v. Jones*, 9 Cal. 643; *Vandever v. Freeman*, 20 Tex. 33, 70 Am. Dec. 391 (relief in equity); *O'Toole v. Hurley*, 73 N. W. 805, 115 Mich. 517; 97 N. W. 808, 70 Neb. 613; 55 A. 364, 75 Vt. 264; 117 Mich. 602, 76 N. W. 97 (even though inventory not filed). But a debt or note which is secured, as, for instance, by mortgage, ought, in order to be enforced apart from such security, to be thus sued upon or presented. *Willis v. Farley*, 24 Cal. 490. See 67 Cal. 178, 7 P. 477. And see as to partnership claim, *Fillyan v. Laverty*, 3 Fla. 72.

For statute provision as to claims with right of action accruing later, see 128 Mass. 528; 17 Iowa, 479; *Greene v. Dyer*, 32 Me. 460. Presentment may sometimes be made before they actually mature. 49 Conn. 251. And see 60 Miss. 987; 78 Ala. 130.

These non-claims statutes, together with the local decisions construing them, are very numerous. The practitioner is little interested, however, except in knowing the practice of his own State. For an English statute somewhat corresponding, see Act 22 & 23 Vict. c. 35; 24 W. R. 371. While the representative may ordinarily relieve a debt not barred in his decedent's lifetime from the general statute of limitations, as contrasted with this special one, yet in a bill to marshal assets he cannot relieve some and hold others barred. 72 Ga. 495; *supra*, 389-391. Nor can he waive the bar of non-claim. *Ib.*; 77 Ala. 553.

<sup>2</sup> *Boltwood v. Miller*, 112 Mich. 657, 71 N. W. 506; 7 Humph. 373; *Ames v. Jackson*, 115 Mass. 508; *Perry v. Field*, 40 Ark. 175.

<sup>3</sup> In many States they should be presented first to the executor or administrator; whose settlement of the same in due season will obviate all further proceedings on the claimant's part; while his refusal or neglect to settle will throw the claimant back upon the usual remedies at law; the probate tribunal passing, not upon individual

421. **Funeral charges are not, to speak accurately, debts due from the deceased,** but charges which the law, out of decency, imposes upon the estate; and so far as these are reasonable in amount, they take legal priority of all such debts; as, likewise, do the administration charges.<sup>1</sup> A decent burial should comport with the condition of the deceased and the amount of his fortune. Justice to creditors, as well as to one's surviving family, demands,

claims, but only upon the administration account, with its various items; nor in advance of a payment, but after payment has been made. *O'Donnell v. Hermann*, 42 Iowa, 60; 39 N. J. Eq. 501; 4 Bush, 405; Busb. (N. C.) L. 127.

But, in some parts of the United States, the probate court exercises a direct supervision in the establishment of individual claims upon a decedent's estate, to a greater or less degree. As some local statutes prescribe, the claimant must first present his claim for allowance to the representative, upon whose refusal application may be made to the probate court, with notice to him. In various other States, the practice is for the probate court to allow each separate claim before it is paid. 48 Barb. 243; *Danzey v. Swinney*, 7 Tex. 617; 23 Cal. 362; *Dixon v. Buell*, 21 Ill. 203. Or there may be commissioners to allow, as some statutes provide. 434, *post*. A probate court does not commonly order allowance, however, in any such sense as to prevent the legal representative from contesting the claim; nor, in general, so as to impair the validity of the creditor's claim, or his right of action elsewhere. 6 Barb. 352; *Swenson v. Walker*, 3 Tex. 93; 13 Ill. 157; *Scroogs v. Tutt*, 20 Kan. 271; *Branch Bank v. Rhew*, 37 Miss. 110; *Stanford v. Stanford*, 42 Ind. 485; *Rosenthal v. Magee*, 41 Ill. 371. See *Whitmore v. San Francisco Union*, 50 Cal. 145.

In States where claims are duly filed in court, it is usual for the statute to require that they be authenticated by the affidavit of the creditor before they can be allowed against the estate. Whatever is a good defence against a suit on a claim is equally good against its allowance by the probate court. A claim against an estate has no judicial standing in the probate court until it has been allowed and approved; and until it has been rejected, whether by the administrator or the probate judge, it has no judicial standing in any other court. 7 Tex. 617; 70 Ill. 647. One object of requiring presentment to the probate court is the due classification and record of the admitted demands upon the estate. The general policy indicated is, that neither the executor or administrator nor the probate court shall have power to settle a claim not authenticated, presented, allowed, and approved, according to the local statute. The representative may object to any such claim, and oppose its admission. Cf. 35 La. Ann. 858. Appeal allowed, 61 Tex. 213; 4 Redf. 490. There are various incidents or exceptions, and the decisions under local statute are very numerous. One should present his claim formally and not rely upon a representative's mere knowledge; but the form of claim need not usually be technical or precise. See 39 Ohio St. 112; 40 N. J. Eq. 59; 67 Iowa, 458, 25 N. W. 704. Public taxes, or claims already of record, such as a mortgage, need not be formally presented, under some codes. But a claim admitted by the executor or administrator, and thus allowed and classified by the probate court, has, in many States, the dignity and effect of a judgment. *Tate v. Norton*, 94 U. S. 746, 24 L. Ed. 222; *Carter v. Engles*, 35 Ark. 205. And see *Lambert v. Craft*, 98 N. Y. 342 (effect of unliquidated and undisputed claim); 144 Mo. 258, 46 S. W. 135. Cf. 48 Barb. 243; 7 Iowa, 324. And see 83 N. E. 194, 231 Ill. 492; 37 Tex. 242; 26 Cal. 420; 35 Neb. 422.

This filing of claims is not an uncommon incident of bankruptcy and insolvency practice; but, with reference to the estate of a decedent which proves insolvent, a special statutory course is marked out by our several codes. An executor who has given bond as residuary legatee can settle claims at his discretion, and no one can question his acts in this respect but his sureties when his course has brought them into trouble. *Durfee v. Abbott*, 50 Mich. 278, 15 N. W. 454; *Wheeler v. Hatheway*, 58 Mich. 77, 24 N. W. 780. As to appeal, see *Berkey v. Judd*, 31 Minn. 271, 17 N. W. 618.

<sup>1</sup> To these, local American statutes add expenses of last illness, as among preferred claims. See *post*, 423.



however, that there shall be no extravagant outlay to their loss.<sup>1</sup> The standard of reasonable burial expenses is established by local and contemporary usage; for religious and humane sentiment carries the cost far beyond what mere sanitary rules might prescribe, and that sentiment should not be outraged.<sup>2</sup>

<sup>1</sup> 2 Bl. Com. 508; Wms. Exrs. 968; *Parker v. Lewis*, 2 Dev. L. 21; *Flintham's Appeal*, 11 S. & R. 16.

<sup>2</sup> Lord Holt's early restriction in case of insolvency to coffin, bell ringing, bearers, etc., is quite out of date. *Shelley's Case*, 1 Salk. 296. Thus, at the present day, the undertaker's and grave-digger's necessary services should be allowed in addition to those pertaining to religious exercises; also the cost of a plain coffin or casket, the conveyance of the remains to the grave, and the grave itself; all these being essential to giving the remains a decent funeral. See 4 Burn. Ecc. L. 348, 8th ed. As to a suit of clothes to lay out the deceased in, see 2 Tenn. Ch. 369. On the other hand, mutes, weepers, pallbearers, in needless array; carriages for mourners, and especially carriages for casual strangers; floral decorations, refreshments, hired musical performances; and the processional accompaniments of a funeral,—all these, though appropriate, often, to the burial of those who are presumed to have left good estates, are inappropriate to the poor, the lowly, and those whose creditors must virtually pay or contribute to the cost. Public demonstrations which increase the outlay, the attendance of societies to which the deceased belonged, military and civic escorts, and the like, are always properly borne by such bodies or by the public thus gratified, rather than imposed as a charge upon a private estate which cannot readily bear the burden. *Hewett v. Bronson*, 5 Daly, 1; *Shaeffer v. Shaeffer*, 54 Md. 679, 39 Am. Rep. 406. If public or benevolent societies defray part of the cost, only the excess can be charged to the estate. 11 Phila. 135. See 124 N. Y. 388, 26 N. E. 954 (cost of commandery parade disallowed). Statutes may define locally. 64 N. E. 90, 158 Ind. 64. The religious persuasion of the deceased, or, perhaps, of his immediate family, may be fairly considered in determining the character and items of cost in the funeral; thus, Jewish, Christian, and Pagan usages differ on these points, likewise Catholic and Protestant, nor do all Protestant sects agree among themselves. National habits, and those of one's birthplace, besides, deserve consideration, whatever may have been the last domicile. 106 N. Y. S. 1135 (expense of "wake" allowed). The presumption is that the deceased has desired to be buried in accordance with the usages and customs, civil and religious, of the society to which he belonged, and so as to retain its respect. *Hewett v. Bronson*, 5 Daly, 1. See as to a Hindoo testator, 1 Knapp, 245; Wms. Exrs. 971. *Contra*, a vicious usage. *Shaeffer v. Shaeffer*, 54 Md. 679, 39 Am. Rep. 406. But the last express wishes of the deceased may well be complied with, in directing the style and character of the funeral, provided these wishes be not extravagant or unreasonable, and no injustice be done to creditors and others in interest. See *Stag v. Punter*, 3 Atk. 119; *Donald v. McWhorter*, 44 Miss. 102. The sanction, too, of one's immediate family is an element of some importance in arrangements so delicate, which necessarily depend more upon the presumed than the actual condition of one's estate. 3 Atk. 119.

Keeping these elements of distinction in view, the standard of allowance for funeral expenses may be often regulated most conveniently by fixing a sum total. The standard varies essentially, however, with the age and locality; as between city and country or polished and simple communities; and, in general, according to the testator's station in life; all this aiding, doubtless, in fixing a scale of prices which, even in such simple items as the cost of a coffin, may vary greatly. 1 B. & Ad. 260; *Yardley v. Arnold*, 1 C. & M. 434. Where the estate is insolvent, not more than \$200 or \$300 should be allowed for a funeral. 28 La. Ann. 149; 3 MacArthur, 537. Special circumstances may justify an expenditure unusually great in one or more particulars; as if one's local fame should forbid a funeral strictly private; or if one should die far from home or far from his proper burial-place. *Prec. Ch.* 261; *Stag v. Punter*, 3 Atk. 119. See also *Hancock v. Podmore*, 1 B. & Ad. 260.

Items not, perhaps, strictly within the rule of funeral charges, have been allowed from an estate, out of regard to particular circumstances or a decedent's last directions.

422. But other charges, as for final interment, gravestone and the like, are also referred to this head; and here the representative should use a deliberate judgment.<sup>1</sup>

See 92 Cal. 293, 28 P. 287; Wood's Estate, 1 Ashm. 314; 3 La. Ann. 436; Paice v. Archbishop of Canterbury, 14 Ves. 364 (mourning rings). Cf. 2 C. & P. 207; Flint-ham's Estate, 11 S. & R. 16. And over carriages used for the immediate family of the deceased, and other incidental charges of trivial amount, vexatious dispute is undesirable; for, if one dies without leaving the means of paying his creditors, those naturally dependent upon him must needs suffer, too. For the obligation of husband and father, as to deceased wife or child, see Staples's Appeal, 52 Conn. 425; Sullivan v. Horner, 41 N. J. Eq. 299, 7 A. 411; Schoul. Dom. Rel., § 199; 44 Ohio St. 184, 58 Am. Rep. 814, 5 N. E. 861 (statute); 33 Ch. D. 575 (wife with separate property); 53 N. J. Eq. 341, 31 A. 210; 48 S. E. 124, 120 Ga. 606. See as to widow, Walton v. Hall, 66 Vt. 455, 29 A. 803.

Claims founded in the expenses incurred by relatives of the deceased in attending the funeral, their services and time, are not to be favored in settling a decedent's estate; for these are presumably offices of respect and tenderness, gratuitously rendered, and neither purchased nor solicited. Lund v. Lund, 41 N. H. 355. But cf. peculiar circumstances in Jennison v. Hapgood, 10 Pick 77; 3 Bradf. Sur. 424; Wall's Appeal, 38 Penn. St. 464. And see 63 A. 143, 78 Vt. 414; Shaeffer v. Shaeffer, 54 Md. 679, 39 Am. Rep. 406.

In general, allowances for a funeral depend much upon whether the estate was insolvent or not, and whether items in the account presented are objected to or not by parties interested. For those entitled to the surplus of an ample estate may all agree to bear the cost of a most extravagant funeral; and public or private generosity may contribute to the cost. Funeral charges, in the literal sense, are always to be incurred in haste, usually without the means of ascertaining the true state of the decedent's fortune or who may rightfully share it, and often at the discretion of a surviving spouse, or of some near relative or friend, without actual sanction from an undisclosed or at least unaccredited legal representative. See 193, 398, *supra*; Loftis v. Loftis, 94 Tenn. 232, 28 S. W. 1091; Joy v. Fesler, 67 N. H. 237, 29 A. 448; Dudley v. Sanborn, 159 Mass. 185, 34 N. E. 181; Waters v. Register, 56 S. E. 849, 76 S. C. 132.

<sup>1</sup> Circumstances may justify a temporary interment, pending settlement of the estate. The purchase of a burial lot or tomb, when, as often happens, the deceased owned none at his death, may thus become a matter for delicate adjustment between one's legal representative and members of his immediate family; the last having usually the right of selection, and claiming from the estate, in return, what, according to the decedent's condition and circumstances would be fair remuneration. Pettengill v. Abbott, 167 Mass. 307, 45 N. E. 748. As to any estate, and an insolvent's estate in particular, there is no legal reason why the executor or administrator should pay in full for land or a tomb in which others than the decedent are to have burial rights; while it is certain that for his own last resting-place or burial right, a decedent's estate ought to be charged something. Provisions relating to the place of burial are frequently made, however, in one's last will, and directions may thus be given by the general owner as to the use and care of the lot his remains are to occupy. See Cool v. Higgings, 23 N. J. Eq. 308; Luckey, *Re*, 4 Redf. 265; Cannon v. Apperson, 14 Lea, 553. See further, Tuttle v. Robinson, 33 N. H. 104; 11 Phila. 123. Statutes regulate this subject to some extent. Disinterment or re-burial is justified in a variety of suitable instances. See 3 Dem. 524; Watkins v. Romine, 106 Ind. 378, 7 N. E. 193; Parry's Estate, 188 Penn. St. 38, 41 A. 384, 68 Am. St. Rep. 850, 49 L. R. A. 444.

A gravestone or monument is an item of cost allowable to a reasonable amount in the settlement of the estate. Local codes sometimes sanction expressly such erections. Durkin v. Langley, 167 Mass. 577, 46 N. E. 119. See also Bell v. Briggs, 63 N. H. 592. Some sort of marker, to identify and protect the remains, seems highly proper in all cases; but, beyond this, the choice takes so wide a range, from the needful to the highly ornamental, that the discretion of the court has often been invoked. The general rule of funeral charges here applies, that no precise sum can be fixed, but the standard must vary with local price and usage, the station in life of the deceased, and the extent of his fortune. See Brackett v. Tillotson, 4 N. H. 208. For various in-

423. **Administration charges and debts of last sickness** are also preferred in local law with funeral expenses.<sup>1</sup>

424. **These preferred claims all rank together, under the usual rule: funeral, last illness and administration charges.** And where the assets are not sufficient to pay all these preferred claims in full, they must with little formality be divided ratably, for the policy

stances of cost allowed (proportion often of about \$30 to an estate of \$3,000), see *Lund v. Lund*, 41 N. H. 355; *Jennison v. Hapgood*, 10 Pick. 77; *Fairman's Appeal*, 30 Conn. 205; *Springsteen v. Samson*, 32 N. Y. 714; *Webb's Estate*, 165 Penn. St. 330. 30 A. 827, 44 Am. Rep. 666; 21 N. Y. Supr. 296; 4 Redf. 95; *Ferrin v. Myrick*, 41 N. Y. 315; *Porter's Estate*, 77 Penn. St. 43. The rights of creditors are to be regarded where the estate is insolvent; and always that of heirs and family in general. But members of the family cannot bind the estate in disregard of the representative himself. *Foley v. Bushway*, 71 Ill. 386; *Samuel v. Thomas*, 51 Wis. 549, 8 N. W. 361; 44 Ind. 331. As to statues and monuments of costly design, the executor or administrator ought either to have, besides an ample estate, the explicit directions of the deceased as his warrant, or the consent of surviving spouse or heirs, or the previous approbation of the probate court; and his safer and more natural course is, in general, to let the family and those interested in the surplus, or nearest to the deceased, fix upon something appropriate in structure, design, and inscription; binding the estate, on his part, only for a reasonable proportion of the cost, if the cost be large, and requiring them to stand responsible for any excess. 30 Conn. 205; 41 N. H. 355; 14 S. & R. 64; *Pistorius's Appeal*, 53 Mich. 350, 19 N. W. 31. Cf. *Lutz v. Gates*, 62 Iowa, 513, 17 N. W. 747. A delicate regard for all those whose pecuniary interests are likely to be diminished by the funeral charges should in general influence the legal representative; but, at the same time, if the estate be solvent, he need not permit penurious and unfeeling kindred to rob the deceased of the last decent tributes to his memory. And see *Bainbridge's Appeal*, 97 Penn. St. 482 (testator's own direction to expend entire residue thus). Where the cost of a monument is to be defrayed in whole or part by friends of the deceased or the public, a corresponding mutual consultation and understanding is proper. See further, *Wms. Exrs.* 1788; *Patterson v. Patterson*, 59 N. Y. 574, 17 Am. Rep. 384, and cases cited; *supra*, 398. And as to set-off, see 86 N. C. 158; 92 N. C. 471. Monuments and memorials of the deceased, which have no connection with funeral charges or the place of final interment, cannot of course, be made a burden upon the estate to the detriment of unwilling parties in interest. 14 S. & R. 64; 53 Mich. 350, 19 N. W. 31. But with or without the consent of these, the probate court may often conclude how much should be expended or allowed. *Crapo v. Armstrong*, 61 Iowa, 697, 17 N. W. 41; 62 ib. 513, 17 N. W. 747.

<sup>1</sup> See *post*, Part VII, as to administration charges.

Statutes in various States rank the necessary expenses of a decedent's last sickness under preferred claims; though the rule is of modern and American creation. *Wilson v. Shearer*, 9 Met. 507; *Wms. Exrs.* 968, 988. No precise rule can be laid down as to the duration of one's last illness, nor for the degree or details of attention paid; this must vary with the nature of the disease and the situation of the patient. *Percival v. McVoy*, *Dudley* (S. C.) 337; 8 Greenl. 167; *Plitner v. Hanley*, 18 Me. 270; *Elliott's Succession*, 31 La. Ann. 31. Unlike administration and funeral expenses, these are not charges growing out of one's death, but are rather debts due from the deceased for services rendered him during his life; yet a similar necessity may cause them to be rendered independently of his consent, and a similar policy favors their priority. *United States v. Eggleston*, 4 Sawyer (U. S. Cir.) 199. We shall see, hereafter, that the statute allowance to a widow and young children, in various States, may also take precedence of general debts due from the deceased person's estate. C. 2, *post*. Under the Georgia code the support of family for a year has precedence over the physician's bill. 73 Ga. 741. Cf. 60 La. Ann. 152, 840, 24 So. 285. For medical services rendered outside of decedent's own needs the estate is not liable. *Johnston v. Morrow*, 28 N. J. Eq. 327; *Smith v. McLaughlin*, 77 Ill. 596 (coroner's inquest).

of our law does not favor declaring an estate insolvent, merely for the sake of distributing assets among such claimants.<sup>1</sup>

425. Next, as to priority in the general payment of debts, where the assets are not ample.<sup>2</sup> Generally speaking, when the estate of a deceased person proves insolvent or insufficient to meet all the demands presented, it shall, after discharging preferred claims, be applied to the payment of his debts in a prescribed order of classification. If there is not enough to pay the debts of any class, the creditors of that class shall be paid *pro rata*; and no payment shall be made to creditors of any class until all those of the preceding class or classes, of whose claims the executor or administrator has notice, are fully paid.<sup>3</sup>

426. Under English law the early rules of priority carried such classification to an extreme limit.<sup>4</sup>

<sup>1</sup> *Post*, 446; *Bennett v. Ives*, 30 Conn. 329. But these preferred claims appear by some codes to rank in consecutive order. 11 Iowa, 276. And statutes require their timely presentation. See 31 La. Ann. 31. See further, *Booth v. Radford*, 57 Mich. 357, 24 N. W. 102; *McClellan v. Filson*, 44 Ohio St. 184, 58 Am. Rep. 814, 5 N. E. 861. Preference to judgments unless the statute is explicit. 41 N. J. Eq. 244, 3 A. 709. Cf. 14 Phila. 569.

<sup>2</sup> 2 Bl. Com. 411; *Wms. Exrs.* 989.

<sup>3</sup> See local codes; *Wms. Exrs.* 992; *Moore v. Ryers*, 65 N. C. 240. Joint debts must be paid *pari passu* with separate debts. *Pearce v. Cooke*, 13 R. I. 184.

<sup>4</sup> *Wms. Exrs.* 991-1026; (1897) 1 Ch. 673; 6 Ves. 98, 441, 804; 2 Bl. Com. 341, 511. (1) Debts due the crown, by record or specialty, occupied the first class, these taking precedence of all dues to a private subject. (2) Next came miscellaneous debts described to which particular statutes accorded a certain precedence. (3) To these succeeded debts of record; among which judgments or decrees rendered against the deceased were preferred both to recognizances, or penal obligations of record, and the now obsolete securities by statute, which were likewise a sort of bond by record. (4) Debts by specialty followed, as on bonds, covenants, and other instruments sealed and delivered; under which head, by construction, a debt for rent was included. (5) Last in order came simple contract debts, or such as were founded in parol or writing, not under seal.

To pass over demands of the second class, which are of a purely arbitrary and exceptional kind, those of the third, fourth, and fifth classes, must needs provoke much controversy. Thus, as to the third class, judgments rendered against the decedent, whether prior in point of time or not, are preferred to recognizances and statutes of that class, and of course to all debts by specialty or simple contract; but the judgment must have been rendered in a court of record; and the rank is accorded only to domestic and not to foreign judgments. *Holt v. Murray*, 1 Sim. 485; 2 Vern. 540; Dougl. 1; *Harris v. Saunders*, 4 B. & C. 411. And see 1 Mod. 6; *Colesbeck v. Peck*, 2 Ld. Raym. 1280; *Ashley v. Pocock*, 3 Atk. 308. In order to maintain their priority in the administration of the estate, judgments against the deceased must, in modern practice, be docketed; while, as among themselves, neither the cause of action nor the order of docketing can give one judgment precedence of another. See various statutes enumerated in *Wms. Exrs.* 998-1004; *Kemp v. Waddingham*, L. R. 1 Q. B. 355; Stat. 23 & 24 Vict. c. 38; *Fuller v. Redman*, 26 Beav. 600. As to a decree in equity obtained against the deceased, see *Searle v. Lane*, 2 Vern. 89; *Wilson v. Lady Dunsany*, 18 Beav. 299; *Wms. Exrs.* 1005. As for a recognizance or security by statute, which, though an obligation or bond of record, is postponed to judgments of record and decrees, see *Bothomly v. Fairfax*, 1 P. Wms. 334; *Wms. Exrs.* 1006-1010.

427. The distinction here made between specialty and special contract debts gave rise to many refinements.<sup>1</sup> Such was the dissatisfaction in later times upon these preferential distinctions between the specialty and simple contract debts of deceased persons, that Parliament interfered (1870) with an act abolishing mostly such priorities.<sup>2</sup>

428. The American rules of priority among claimants, like those relating to the insolvent estates of deceased persons, are fixed by local statutes by no means uniform. But, in most parts of the United States, the disposition has been to reduce the classification of a deceased person's debts to the simplest system possible, thereby avoiding the close discriminations just noticed.<sup>3</sup> The

<sup>1</sup> See *e.g.*, *Ivens v. Elwes*, 3 Drew. 25; *Wms. Exrs.* 1012; 1 Ves. Sen. 313; 6 De G. M. & G. 572, as to the obligation and not the recital. And as to payment on a bond, see *Hodgson v. Shaw*, 3 M. & K. 183; *Wms. Exrs.* 1013, 1014; *Parker v. Young*, 6 Beav. 261. A demand founded in a broken covenant is a specialty debt, whether it be for damages merely, or some specific sum. *Plumer v. Marchant*, 3 Burr. 1380; *Broome v. Monck*, 10 Ves. 620; 2 Sm. & G. 305; *Wms. Exrs.* 1017. And as to breaches of trust, see 1 P. *Wms.* 130; *Turner v. Wardle*, 7 Sim. 80; 1 Drew. 477 (not a specialty debt unless on express covenant and conveyance). Debts by mortgage rank also with specialty debts, where there is a bond or covenant for the payment of money; otherwise they constitute only a simple contract debt with security. 3 Lev. 57; *Cro. Eliz.* 315. And see as to future or contingent debts by specialty, *Wms. Exrs.* 1022-1025; *Atkinson v. Grey*, 1 Sm. & G. 577; *Collins v. Crouch*, 13 Q. B. 542; 5 T. R. 307; 3 Ves. & B. 194. Finally, simple contract debts embrace all which are founded in parol and written engagements not under seal, including sums due on bills and promissory notes, and transactions by word of mouth. *Wms. Exrs.* 1025, 1026.

<sup>2</sup> Stat. 32 & 33 Vict. c. 46 (which places specialty and simple contract creditors on an equal footing); *Wms. Exrs.* preface, 1011. The priority of judgment creditors, however, is still recognized. *Smith v. Morgan*, L. R. 5 C. P. D. 337. See 25 W. R. 842, as to debts under a lease. And see 31 Ch. D. 440; *Hankey, Re*, (1899) 541 (insolvent estate).

<sup>3</sup> The general tendency in the United States has long been to rank specialty and simple contract debts (with, perhaps, judgment debts besides) upon one and the same equal footing. 2 Kent Com. 418, 419; cases cited *post*. Nor do claims for rent appear to have been greatly regarded in this country as entitled to a preferred rank, because of the incident of land tenure alone. 6 Lans. 485. As to rent due for a pew, see *Johnson v. Corbett*, 11 Paige, 265. But cf. 159 Ill. 311, 42 N. E. 844. Taxes only have the decided preference accorded in the several States; these claiming the usual favor of public dues; and debts entitled to a preference, under the laws of the United States, taking precedence of State taxes. The laws of the United States control all State laws as concerns the federal priority. 4 McLean, 607; *Beaston v. Farmers' Bank*, 12 Pet. 102. In practice, Congress requires simply that debts due from the deceased to the United States shall first be satisfied, where the estate is insufficient to pay all debts due from the deceased. This priority of the United States extends of right only to net proceeds, after the necessary charges of administration, etc., have been paid; it is a priority as among creditors. *United States v. Eggleston*, 4 Sawyer, 199; *United States v. Fisher*, 2 Cr. 358. As to local taxes, see 77 Va. 820. When an administrator does not need the lands of his intestate for the payment of debts, it is not his duty to pay the taxes thereon. *Reading v. Wier*, 29 Kan. 429. Taxes on the land, water rates, etc., charged before the owner's decease, may be properly paid by the administrator, but not usually those accruing afterwards. 13 Phila. 262, 289; 3 Dem. 369; 88 Ga. 364, 14 S. E. 596. But a personalty tax is a proper debt for payment from a decedent's

American rule appears to be to consider the rights of creditors as fixed at the debtor's death, according to their due rank; so that no one shall, by superior diligence or by preferential dealings with the executor or administrator, or by pushing his suit to judgment, get an advantage over the others.<sup>1</sup> Nor are distinctions favored between legal and equitable creditors, or legal and equitable assets for satisfying their claims.<sup>2</sup>

estate. *Jefferson's Estate*, 35 Minn. 215, 28 N. W. 256; 139 Mo. 582, 39 S. W. 809; 73 Cal. 545, 15 P. 121. See also 39 N. J. Eq. 258; 20 Fla. 292. Unpaid county taxes are in some codes inferior to taxes due the State, to widow's allowances, etc. 69 Ga. 326. And see 97 Iowa, 420, 66 N. W. 744. As to alimony claim, see 122 Cal. 462, 55 P. 249. And in all cases, cf. local code. Debts "due to the public" have sometimes a priority accorded by statute, though not over liens general or special. *Baxter v. Baxter*, 23 S. C. 114. Statute formalities as to presentment of claims do not usually apply to taxes or public dues. See 63 Md. 465; 119 Mo. 661, 24 S. W. 1032; *supra*, 420. See also 3 McCord, 377 (debt to a State Bank not included); 1 Sneed, 351; 11 Ga. 346; 152 Ind. 186, 52 N. E. 806. Taxes or public dues are in various States accorded a priority so great that they may be sued upon specially, though the estate be pronounced insolvent. *Bulfinch v. Benner*, 64 Me. 404. And see *Bowers v. Williams*, 34 Miss. 324; 2 Vt. 294. But the taxes thus payable are those primarily which the decedent was owing at his death. Later taxes follow the rule of the statute imposing them; but a representative should not pay an assessment upon land which the heir or devisee should discharge; nor encumber personal assets with charges that do not properly fall upon them, nor the whole personal estate with taxes which concern specific chattels. See *Lucy v. Lucy*, 55 N. H. 9; *Deraismes v. Deraismes*, 72 N. Y. 154.

In various States, the older English classification has been more closely followed, under statutes now or formerly in force, though the general policy is that indicated in the text. Hence are found numerous American decisions as to priority, under (1) judgments, (2) specialty debts and (3) simple contract debts. But as all such cases are of purely local application, and many of them have now become obsolete, in view of the latest local legislation, they need not be here cited, and the practitioner is referred to his own State code and digests.

Special preferences are seldom favored in our present legislation, further than taxes or public dues; or such as are indicated in *supra*, 421-424; or perhaps wages due servants or operatives. See 19 Mo. 136; 35 Penn. St. 395; 56 Kan. 281, 54 Am. St. Rep. 590, 31 L. R. A. 538, 43 P. 236; 30 La. Ann. 245.

<sup>1</sup> 4 Penn. St. 32, 45 Am. Dec. 665; *McClintock's Appeal*, 29 Penn. St. 360; *Allison v. Davidson*, 1 Dev. & B. Eq. 46; *Boyce v. Escoffie*, 2 La. Ann. 872; *Lidderdale v. Robinson*, 2 Brock. 159. And see local statutes which give the representative time to examine into the condition of the estate before creditors can sue him.

<sup>2</sup> *Sperry's Estate*, 1 Ashm. 347. But cf. *Jones v. McCleod*, 61 Ga. 602. An administrator, having assets in his hands, who fails to pay off a judgment rendered against him as administrator, becomes personally liable. *Jeeter v. Durham*, 6 J. J. Marsh. 228. Penalties incurred by the deceased, under a contract made by him while living, must be paid. *Atkins v. Kinnan*, 20 Wend. 241, 32 Am. Dec. 534. Or obligations as a surety. *Berg v. Radcliff*, 6 Johns. Ch. 302. Under some local statutes the indorsee of a promissory note is creditor of the estate; not the indorser. *Meriden Steam Co. v. Guy*, 40 Conn. 163. As to allowing an indorsement as a contingent claim, see *Curley v. Hand*, 53 Vt. 524. The claim against one's estate for a balance due as fiduciary of an estate, such as an administrator, trustee, guardian or attorney, is, in some States, treated as of special dignity. *Johnson v. Brady*, 24 Ga. 131; *Curle v. Curle*, 9 B. Mon. 309; *Smith v. Blackwell*, 31 Gratt. 291; 38 Ga. 75; *Wilson v. Kirby*, 88 Ill. 566. But, by the usual rule, breach of trust, unless founded in a specific specialty, constitutes only a simple contract debt. 2 Edw. (N. Y.) 57; *supra*, 427; *Rolair v. Darby*, 1 McCord (S. C.) Ch. 472. See further, *Muldoon v. Crawford*, 14 Bush, 125; *Van Duzer, Matter of*, 51 How. (N. Y.) Pr. 410.

429. **Claims grounded in a tort or for damages unliquidated** are considered in our modern codes in connection with the settlement of estates.<sup>1</sup> Contingent claims, or such as are not absolute or certain, are found specially provided for in local codes for the presentment and settlement of claims against a decedent's estate.<sup>2</sup>

430. **As concerns the rights of creditors having security,** a mortgage debt, even of real estate, is payable out of the personal assets of the deceased on the usual principles; and a personal covenant in such mortgage will bind the deceased mortgagor's personal estate.<sup>3</sup> But, where the personal estate of a deceased debtor is distributed among his creditors, and especially in case of insolvency, a creditor, who has security upon another fund which is primarily liable, should be compelled to exhaust his remedy against that fund, and come in against such personal estate for the deficiency only.<sup>4</sup> And an executor or administrator has no right to redeem property for the benefit of the widow or heirs, at the cost of an insolvent estate, nor in general to discharge incumbrances by mortgage, pledge, or lien, on his sole responsibility, and without judicial order, where the estate is likely to derive no advantage

Individual creditors can insist on the full payment of their debts from the decedent's estate, before the allowance of partnership debts from the individual assets. *People v. Lott*, 36 Ill. 447; *Higgins v. Rector*, 47 Tex. 361. The balance due to the surviving partner on adjustment of accounts is a proper claim. *Babcock v. Lillis*, 4 Bradf. (N. Y.) 218. See also 3 Abb. (N. Y.) Pr. 177.

The power of the probate court to re-classify and change its order, in States where such classification devolves upon the court, is sometimes denied. *Corsitt v. Biscoe*, 12 Ark. 95. See *Nelson v. Russell*, 15 Mo. 356 (not after exhaustion of assets); 56 Mo. 304.

<sup>1</sup> Statutes are found which expressly declare the rank such claims shall occupy. See *supra*, 282, 427; *Smith v. Sherman*, 4 Cush. 408; Stat. 3 & 4 Wm. IV, c. 42; Wms. Exrs. 1026; 2 Redf. (N. Y.) 92; 102 S. W. 884, 31 Ky. Law, 537. Breaches of trust unless committed in breach of some sealed instrument, were regarded by the old law as simple contract debts; while, as we have seen, a broken bond or covenant served as the foundation of a specialty debt. *Supra*, 427; Wms. Exrs. 1018; 2 Atk. 119. All such claims should be presented according to the usual rules. *Halleck, Estate of*, 49 Cal. 111. See as between "liquidated" and "unliquidated" debts, 62 Ga. 135.

<sup>2</sup> 72 Minn. 232, 75 N. W. 220. But a subsisting demand which had matured and was capable of enforcement while decedent was alive is not contingent. 52 Neb. 532, 72 N. W. 848; *Sargent v. Kimball*, 37 Vt. 321. See 158 Mass. 418, 33 N. E. 928; 419, *supra*.

<sup>3</sup> *Howel v. Price*, 1 P. Wms. 291; *Sutherland v. Harrison*, 86 Ill. 363; *Mahoney v. Stewart*, 123 N. C. 106, 31 S. E. 384. But as to exonerating the real estate by the personal, see *post*, Part VI, c. 1. And see *Dennis v. Sharer*, 56 Mich. 224, 22 N. W. 879; 61 Ohio St. 146, 55 N. E. 408. In case the deceased mortgagor was not seized of the mortgaged property at the time of his death, the mortgagee has his choice, either to rely upon such property, or resort to the decedent's estate for payment. *Rogers v. State*, 6 Ind. 31. See *Whitmore v. San Francisco Sav. Union*, 50 Cal. 145. And see as to insufficiency of mortgaged real estate, 3 Redf. (N. Y.) 503.

<sup>4</sup> See *Halsey v. Reed*, 9 Paige, 446; *Shelden v. Harner*, 59 Mich. 444, 26 N. W. 667; *Murray's Estate*, 18 Cal. 686; *Murphy v. Vaughan*, 55 Ga. 361. But cf. *Alter v. O'Brien*, 31 La. Ann. 452.

from the act, but rather the reverse.<sup>1</sup> Lien, mortgage, and pledge creditors, in general, take the full benefit of their security, notwithstanding the death of the debtor; and may apply such security in discharge of their respective claims, under the usual rules and reserving the usual equities.<sup>2</sup> On the whole, therefore, the rights of general creditors of a decedent are subject to all equities attaching to the estate at the time of his death; such creditors take the estate in the plight in which they find it, and their rights cannot be enlarged beyond their debtor's, to the prejudice of secured creditors or of valid lien priorities.<sup>3</sup>

431. **Invalid claims against the estate must not be paid;** and if exorbitant or partially invalid, the executor or administrator should reduce to the proper amount.<sup>4</sup> Nor can gratuitous and

<sup>1</sup> *Rossiter v. Cossitt*, 15 N. H. 38; *Ashurst v. Ashurst*, 13 Ala. 781; *Ripley v. Sampson*, 10 Pick. 373; *supra*, 318. And see *Slack v. Emery*, 30 N. J. Eq. 458.

<sup>2</sup> Thus, a solicitor or attorney has a particular lien; so, too, has a bailee for hire, or the workman upon a certain thing, or a banker for his advances. *Lloyd v. Mason*, 4 Hare, 132; *Schoul. Bailm.* §§ 122-127; *Leonino v. Leonino*, L. R. 10 Ch. D. 460. So far as pursuing all such rights against the estate is concerned, modern codes and practice often permit the secured creditor either to realize his security or have it valued; and where he elects to value, he can only prove for the balance of his claim less the valuation. *Williams v. Hopkins*, 29 W. R. 767; *McClure v. Owens*, 32 Ark. 443; L. R. 10 Ch. D. 460 (*pro rata* contribution). The duty of the executor or administrator to redeem property of the deceased under mortgage, pledge, execution, etc., where he has sufficient assets, or else to sell, subject to the incumbrance, is found enforced by legislation, provided there appears to be a valuable interest over and above the incumbrance. *Tuttle v. Robinson*, 33 N. H. 104; 1 Bush, 327. The security or securities are of course available by way of preference, in accordance with the usual legal doctrines, and the creditor is not obliged to resort to the general assets like general creditors. If, after realizing upon the security, a balance remains due to the secured creditor, his claim for such balance stands on no better footing than that of unsecured creditors; and, if assets are deficient, he should be paid proportionably with them. 3 Redf. (N. Y.) 503; *Moring v. Flanders*, 49 Ga. 594. As to a vendor's lien for unpaid purchase-money, see *Kimmell v. Burns*, 84 Ind. 370; 44 Tex. 14. And, in general, claims secured by mortgage, pledge, or lien are no exception to the rule which requires personal demands to be presented and proved or sued upon, within a specified time, or else to be barred as against the estate. *Clark v. Davis*, 32 Mich. 154; 56 Mich. 15, 22 N. W. 185 (as to deficiency). *Pitte v. Shipley*, 46 Cal. 154. See *Watt v. White*, 46 Tex. 338. The creditor who probates his claim against the estate is not debarred thereby from proceeding to foreclose his mortgage. *Smith v. Gillam*, 80 Ala. 296; *Simms v. Richardson*, 32 Ark. 297. See 31 Ark. 539. Collateral security, given by the executor or administrator for a debt due from the deceased, cannot operate so as to place the creditor in a better situation against the estate itself than he was in without such security; and a secured creditor's claim, aside from the worth of the security, takes no rightful priority. 4 Gill & J. 295; *Piester v. Piester*, 22 S. C. 139, 53 Am. Rep. 711.

<sup>3</sup> *Dulaney v. Willis*, 95 Va. 606, 64 Am. St. Rep. 815, 29 S. E. 324. Cf. 104 Iowa, 360, 73 N. W. 875. See further, 160 Mass. 499, 36 N. E. 476; 104 N. C. 458, 10 S. E. 709.

<sup>4</sup> A bond debt, founded in immoral consideration, or transgressing the usury laws, or given by one incompetent to contract, comes within this rule. 1 Ves. Sen. 254; 18 Ves. 258; Wms. Exrs. 1016. A manifestly illegal expenditure cannot be allowed on an accounting. *Burke v. Coolidge*, 35 Ark. 180. Otherwise, as to debts paid honestly, and not carelessly, without knowledge that the consideration was illegal. *Coffee v.*



voluntary services rendered the decedent or his estate be made the basis of a claim as for recompense.<sup>1</sup>

432. **As to persons in general, who perform a service in expectation of a legacy,** mere expectation cannot create an enforceable contract; but a mutual understanding that the service would be recompensed by a legacy, may, if shown, afford the basis of a valid claim upon the estate, where the deceased has left no will, or omitted, under his will, to make suitable provision.<sup>2</sup>

433. **Decree or order for payment of claims regularly filed in the probate court** for classification is provided under some local statutes; and, acting upon such order in good faith, the representative is protected.<sup>3</sup> But, except for insolvent estates, the rule elsewhere is, to leave the creditors and legal representative to the usual remedies in other courts, or their private arrangements for adjustment; the probate court confining itself to disputed matters specially referred, and to allowing or disallowing payments charged in the administration account.<sup>4</sup>

Ruffin, 4 Coldw. 487. And see, as to claims of doubtful legality (which appear to be always a fit subject of compromise), *Parker v. Cowell*, 16 N. H. 149. We may presume that the general principle of probate and equity, which exempts a representative from the liabilities of extraordinary bailee or insurer (see *supra*, 315), applies to the payment of claims in modern practice, whether they turn out illegal or not. As to an infant decedent's debts, see *Smith v. Mayo*, 9 Mass. 62, 6 Am. Dec. 28; *Schoul. Dom. Rel.* 3d ed. § 402. See also *Washburn v. Hale*, 10 Pick. 429; *La Rue v. Gilkyson*, 4 Penn. St. 375, 45 Am. Dec. 700; *Smith v. McLaughlin*, 77 Ill. 596. And see 433, *post*. Of claims barred by limitations we have already spoken. *Supra*, 389. And see 176 Penn. St. 387, 35 A. 244.

<sup>1</sup> Debts, for which the deceased was not in fact liable, do not become obligatory by directions in his will that "all just debts" should be paid. *Smith v. Mayo*, 9 Mass. 62, 6 Am. Dec. 28; *Mason v. Man*, 3 Desau. 116. And see *Stephens v. Harris*, 6 Ired. Eq. 57. As to services rendered the deceased by members of his own family or others, see *Schoul. Hus. & Wife*, § 274, and general works on contracts. And see *Shallcross v. Wright*, 12 Beav. 558. But mere inadequacy of consideration will not wholly defeat a claim against one's estate. *Nye v. Lothrop*, 94 Mich. 411, 54 N. W. 178.

<sup>2</sup> 17 N. Y. Supr. 311, 322, and cases cited; 115 N. W. 1052, 152 Mich. 197; 106 Ga. 513, 32 S. E. 600; 58 Neb. 268, 78 N. W. 495; 46 W. Va. 261, 76 Am. St. Rep. 815, 33 S. E. 257; 106 Mich. 490, 64 N. W. 490; 136 Penn. St. 239; Book I, 452, 453. Cf. *Weaver's Estate*, 182 Penn. St. 349, 38 A. 12; 118 N. C. 752, 24 S. E. 542; 93 Wis. 104, 67 N. W. 15; *Ewers v. White*, 114 Mich. 266, 72 N. W. 184. See 490, *post*.

<sup>3</sup> 11 Barb. 554; 12 Ark. 95; *Wood v. Ellis*, 12 Mo. 616; 3 Gill & J. 25; *Lanier v. Irvine*, 24 Minn. 116; *Johnson v. Von Kettler*, 66 Ill. 63; *Jessup v. Spears*, 38 Ark. 457. Where a claim is approved by the executor or administrator, and allowed by the probate court, it cannot be disallowed by collateral proceedings. *Smith v. Downes*, 40 Tex. 57. Nor in equity. 117 N. W. 213, 153 Mich. 120. But the representative should always guard the estate against unjust claims. 186 Mass. 577, 72 N. E. 88. And see, as to matters of local practice, 420 *supra*.

<sup>4</sup> Even in States where claims are first formally allowed and approved, the administrator's payment, without a previous order of the court, is held valid, if in itself a proper payment and such as the court would have decreed. *Lockhart v. White*, 18 Tex. 102. See *Thompson v. Taylor*, 71 N. Y. 217; 4 Bradf. 218.

434. Commissioners or auditors are sometimes appointed, under local statutes, to examine and report to the probate court concerning claims presented against the estate of a deceased person. The duties of such commissioners, as well as the occasion for appointing them, are set forth at length in the local codes, whose provisions should be carefully followed.<sup>1</sup>

435. Where assets are necessarily exhausted in paying debts of the prior class, the executor or administrator is bound to plead accordingly when sued on a debt of lower rank.<sup>2</sup> And if, upon due opportunity to ascertain the condition of the estate, he believes it to be insolvent, he should so represent to the court and relieve himself of undue responsibility.<sup>3</sup> It would be *devastavit*, rendering him personally liable for the deficiency, if the executor or administrator gave preference to a debt of lower dignity over those duly presented of a higher; and this rule is the same in law and equity.<sup>4</sup>

436. Due and timely notice of a debt affects the foregoing rule, and keeps tardy creditors from disturbing the settlement, while obliging all who mean to assert claims upon an estate to present them in good season.<sup>5</sup> As to debts in general, actual notice must have been received by the executor or administrator, in order to preclude the plea of exhausted assets; though, what this notice, the English cases do not clearly determine.<sup>6</sup>

<sup>1</sup> Such commissioners are most frequently appointed where the executor or administrator represents the estate insolvent. As to commissioners appointed on exorbitant claims, see 67 Me. 456. And see *Buchoz v. Pray*, 36 Mich. 429; *Boyd v. Lowry*, 53 Miss. 352; *Commercial Bank v. Slater*, 21 Minn. 72; 56 S. E. 603, 61 W. Va. 315, 9 L. R. A. (N. S.) 997; 115 N. W. 960, 152 Mich. 167; *Hairland v. Trust Co.*, 108 Penn. St. 236. Claims must be presented to them within a specified limited time. The report of such commissioners, as to allowance or rejection is usually final, unless appealed from. *Rogers v. Rogers*, 67 Me. 456; *Probate Court v. Kent*, 49 Vt. 380. See further, local statute; insolvent estates, 446; 31 Vt. 671; 51 Vt. 50; 57 Vt. 49; *Hall v. Wilson*, 6 Wis. 433; *Clark v. Davis*, 32 Mich. 154; 59 Mich. 290, 26 N. W. 519. The commissioners are not a "court" in the constitutional sense. 40 Mich. 503. But cf. 69 A. 655, 81 Vt. 121.

<sup>2</sup> *Wms. Exrs.* 989; 2 Bl. Com. 511.

<sup>3</sup> *Newcomb v. Goss*, 1 Met. 333. But in modern practice a judicious executor or administrator may often bring all creditors to accept a *pro rata* allowance, according due priorities, and so close the estate with less cost and delay. See local statute.

<sup>4</sup> 7 Ired. Eq. 62; *Gay v. Lemle*, 32 Miss. 309; *Huger v. Dawson*, 3 Rich. 328; 2 Rich. (S. C.) Eq. 147; *People v. Phelps*, 78 Ill. 147; *Howell v. Reams*, 73 N. C. 391. Cf. *Miller v. Janney*, 15 Mo. 265.

<sup>5</sup> *Hawkins v. Day*, 1 Dick. 155; *Wms. Exrs.* 1029; 425, 435, *supra*. Hence, an executor or administrator may plead, when sued on a debt of the higher rank, judgment recovered without notice thereof on a debt of the lower rank to the exhaustion of assets; for, unless he knew of the higher debt, he could not have prevented a recovery of the lower. 1 T. R. 690; 3 Lev. 114.

<sup>6</sup> Cf. 1 Mod. 175; *Wms. Exrs.* 1032; *Oxenham v. Clapp*, 2 B. & Ad. 312. But, of judgments, decrees in equity, and debts due by recognizance and statute, the judicial record has been treated as affording constructive notice, which every executor or

437. Among creditors of equal degree, the English law has permitted the executor or administrator to pay one in preference to another at his discretion; a privilege to do injustice to others by way, perhaps, of recompense for the injustice done to himself.<sup>1</sup> This preference may be controlled, however, by proceedings of creditors in the courts.<sup>2</sup> But proceedings in equity may be brought in behalf of one creditor, or several, or all; and to correct the manifest injustice of a preference by the representative, such as the common law permitted, modern English practice favors the chancery bill brought once and for all on behalf of all creditors of the deceased, wherever there is likelihood of insolvency, for the purpose of compelling an account and a just and ratable distribution of the assets among all the creditors.<sup>3</sup>

438. Our American rule, though sometimes yielding to such doctrines,<sup>4</sup> pursues generally a different course, the policy of our legislation being rather to discourage competition among creditors, chancery recourse, and the whole system of voluntary preference.

administrator is bound to regard; such debts being styled debts of record, and classed accordingly. *Cro. Eliz.* 763; *Searle v. Lane*, 2 *Freem.* 104; *Wms. Exrs.* 1031, 1032. With the modern extension, however, of the courts and judicial business, such a rule must needs impose a perilous responsibility upon the legal representative; but, except for requiring that judgments be docketed in order to afford a constructive notice, English legislation long did nothing to alleviate the burden thus imposed upon the representative. *Stat.* 4 & 5 *W. & M. c.* 20; *Stat.* 23 & 24 *Vict. c.* 38. But see *Stat.* 32 & 33 *Vict. c.* 46; also 427, *supra*.

<sup>1</sup> *Wms. Exrs.* 1033; *Lyttleton v. Cross*, 3 *B. & C.* 322.

<sup>2</sup> For as to such creditors of the deceased, a scramble may ensue in the common-law courts; and not he who first commences an action, but he who first recovers a judgment against the executor or administrator, must first be paid. See this rule as developed in *Ashley v. Pocock*, 3 *Atk.* 208; *Wms. Exrs.* 1033, 1034; *Lyttleton v. Cross*, 3 *B. & C.* 217; *Lepard v. Vernon*, 3 *Ves. & B.* 53; 1 *P. Wms.* 215; 5 *Taunt.* 333; *Waters v. Ogden*, 2 *Dougl.* 453. All that the law appears to insist upon is *bona fide* conduct on the part of the executor or administrator, so that the judgment confessed by him, or the plea confessing assets to a certain amount, shall disclose what is truly owing, or what is the true state of the assets, with reference to the several creditors suing, and the time and circumstances of the several suits. *Tolputt v. Wells*, 1 *M. & S.* 395. Where, instead of an action at law, proceedings in equity are commenced, the executor or administrator preserves still his right in the courts, of electing to prefer, as among creditors of the same degree. *Morrice v. Bank of England*, *Cas. temp. Talb.* 217; s. *C.* 2 *Bro. P. C.* 465; *Wms. Exrs.* 1035, 1036.

<sup>3</sup> 1 *Camp.* 148; 2 *Ves. jr.* 518; *Mitchelson v. Piper*, 8 *Sim.* 64; *Wms. Exrs.* 1036, 1037. The barrier thus afforded against the preference among claims of equal rank is still, however, an imperfect one. See *Maltby v. Russell*, 2 *Sim. & Stu.* 227; *Wms. Exrs.* 1038, 1039; *Radcliffe, Re*, *W. R.* 417; 8 *Sim.* 63; 8 *Beav.* 236; *L. R.* 8 *Ch. D.* 154.

<sup>4</sup> See as to preferences, *Place v. Oldham*, 10 *B. Mon.* 400; *Mayo v. Bentley*, 4 *Call* (Va.) 528; *Aiken v. Dunlap*, 16 *John.* 85; 2 *Cr. C. C.* 533; *Wilson v. Wilson*, 1 *Cranch*, *C. C.* 255; 9 *Dana*, 343. See as to judgments of record as notice, 5 *Jones Eq.* 168; *Overman v. Grier*, 70 *N. C.* 693; 7 *Ired. L.* 231; *Keith v. Parks*, 31 *Ark.* 664. Chancery proceedings not favored. *McCoy v. Green*, 3 *Johns. Ch.* 58; *Walker v. Cheever*, 35 *N. H.* 347. And see 3 *Har. & M.* 131.

Under local statutes which require a presentment of claims within a definite period, to the representative or to the court, a date is fixed at which debts become absolutely payable from the estate, according to their statute rank, and the representative is granted full immunity as to all claims not brought to his notice until afterwards, save as the assets then left may suffice for meeting them.<sup>1</sup>

439. **The legal representative has a right to prefer his own debt to all others of equal degree**, and to retain assets for it accordingly, as part of the English system of preference among equal creditors.<sup>2</sup> This privilege being inequitable, courts of chancery do not allow its assertion in respect of equitable assets, sought by their aid; though this right of retainer, as regards legal assets, extends to debts which may be due the executor or administrator, either as trustee or as *cestui que trust*, as well as individually, and chancery itself concedes the principle.<sup>3</sup> But in the United States, if the preference among equal creditors is not favored, still less is that of the executor's or administrator's retainer for his own debt. Confession of judgment, under such circumstances, is viewed with suspicion, nor will the judgment be treated as proof of the debt.<sup>4</sup>

<sup>1</sup> *Supra*, 420, and local codes. See *Newcomb v. Goss*, 1 Met. 333; *Tittering v. Hooker*, 58 Mo. 593. A claim ought to be presented to the executor or administrator in writing, although not positively so required by statute; merely mentioning the approximate amount, etc., is not enough to avoid the barrier. *Pike v. Thorp*, 44 Conn. 450. See further, 61 Cal. 71; 60 Tex. 422.

Provision is usually made (as suggested *supra*, 420) by these American statutes for protecting the interests of creditors with due notice, whose claims will not seasonably accrue, or, under peculiar equitable circumstances, cannot be presented within the period fixed by the statute.

<sup>2</sup> *Wms. Exrs.* 1039-1050, where this topic is fully considered; cases *infra*. This right of retainer is treated as arising from mere operation of law, and the incongruity that one should sue himself or enter into the strife among equal creditors to procure a prior judgment. 2 Bl. Com. 511; 3 Bl. Com. 18; *Wms. Exrs.* 1039. And see (1896) 2 Ch. 345. But the general doctrine of lien, and the maxim that among equals he in possession has the first claim, may likewise be considered the foundation; a doctrine which may still be invoked in aid of administration charges, sums paid and expenses incurred properly in the trust.

<sup>3</sup> 2 Eq. Cas. Abr. 450; 41 L. T. N. s. 672; *Plummer v. Marchant*, 3 Burr. 1380; *Cockroft v. Black*, 2 P. Wms. 298. The right does not extend to the gift, bequest, or transfer of other creditors' proved debts. *Jones v. Evans*, L. R. 2 Ch. D. 420. Nor to a claim for damages arbitrary in amount or unliquidated, as for a tort. *Loane v. Casey*, 2 W. Bl. 968; 1 B. & Ald. 664. See further, *Campbell v. Campbell*, 29 W. R. 233; 32 Ch. D. 395; 27 W. R. 878; L. R. 16 Ch. D. 368; *Gilbert, Re*, (1898) 1 Q. B. 282 (keeping the assets); *Fowler v. James*, (1896) 1 Ch. 48; (1895) 1 Q. B. 59; *Giles, Re*, (1896) 1 Ch. 956. See also *Rhoades, Re*, (1899) 2 Q. B. 347; (1896) 1 Ch. 844; *Davies v. Parry*, (1899) 1 Ch. 602 (insolvency). He cannot retain for a debt due himself which is unenforceable because of the Statute of Frauds. *Rownson, Re*, 29 Ch. D. 358; *supra*, 392. As to setting off the representative's claim from the estate against what he owes it, see 25 Ch. D. 175. As to limitations, see (1896) 1 Ch. 844.

<sup>4</sup> *Smith v. Downey*, 3 Ired. Eq. 268. 1 Dev. & Bat. Eq. 562. 5 Lea, 508, 2 Dev. Ch. 137; *Hubbard v. Hubbard*, 16 Ind. 25. *Henderson v. Ayers*, 23 Tex. 96. *Gadsden v. Lord*, 1 Desau. 247. Though in a few States the English doctrine of retainer may still

440. Interest is not allowable from a decedent's estate, where, from the nature of the debt, no interest was due; and the claims of creditors with whom settlement is made in the ordinary course of administration are usually dealt with on the footing they occupied in this respect at the date of the decedent's death.<sup>1</sup>

441. As to the mode of paying debts and claims, they are to be paid in money which is legal tender, or according to the original contract, or as the creditor and representative may mutually agree.<sup>2</sup> But, as between the representative and the estate, the prudent interests of the latter must be protected and it should benefit by any advantageous settlement.<sup>3</sup>

prevail, the better American policy insists that all creditors of the same rank shall have equal opportunity. 2 Bradf. Sur. 116; 6 Thomp. & C. 288; *Nelson v. Russell*, 15 Mo. 356; 10 S. C. 354; *Wright v. Wright*, 72 Ind. 149; 4 Redf. 263, 499. The claim must be proved and allowed by the probate court. 58 Md. 442; 92 Cal. 433, 28 P. 486. And see Massachusetts and other States whose legislation requires an arbitration of such a claim, if disputed by other parties in interest. Cf. 1 Mass. 200; *Wiley v. Thompson*, 9 Met. 329; 17 Fla. 820. He cannot sue himself at law to recover a debt due to him from the decedent. 11 R. I. 270. Such a claim, however allowed, must take its full or its ratable proportion with those of other creditors. See *Hubbard v. Hubbard*, 16 Ind. 25; *Henderson v. Ayers*, 23 Tex. 96, 65 A. 212; *McLaughlin v. Newton*, 53 N. H. 531. And see *Neilly v. Neilly*, 89 N. Y. 352.

This right of retainer, for the representative's own debt against the decedent, is to be distinguished from his claim for disbursements and the charges of administration, for which he has a lien. See *supra*, 259; 526, *post*.

As to bequest or power to pay under his testator's will, see *Syme v. Badger*, 92 N. C. 706; *Williams v. Williams*, 15 Lea, 438.

But one's own fair and honest claim upon the estate he administers ought to stand upon as good a footing, at least, as other claims; and where real estate may be sold under express power or a license for the payment of debts, the sale may be lawfully invoked for the payment of a debt, in no way invalid or outlawed, which is due the representative. *O'Flynn v. Powers*, 136 N. Y. 412, 32 N. E. 1085. And see Part VI, *post*.

<sup>1</sup> *Davis v. Wright*, 2 Hill (S. C.) 560; *Durnford's Succession*, 1 La. Ann. 92. And see 78 Ky. 548. Statutes sometimes prescribe a different rule, however, where especial delay arises, as in the settlement of an insolvent estate; and upon a contract with the representative himself, or on the ground of his delinquency, a creditor may claim interest as against him, where he, on his part, cannot bind the estate in return. Bonds, notes, and other instruments, given by the decedent, which expressly bear interest, must, doubtless, be paid according to their tenor.

<sup>2</sup> See *Magraw v. McGlynn*, 26 Cal. 420. As to payment in Confederate money, see 38 Ga. 75; 36 Tex. 289; *supra*, 310.

<sup>3</sup> See as to discount, etc., *Heager's Executors*, 15 Johns. 65; *Miller v. Towles*, 4 J. J. Marsh. 255; *Wingate v. Poole*, 25 Ill. 118. A promissory note given by an executor or administrator, for a debt of the testator or intestate, is neither a payment nor an extinguishment of such debt; but, at most, it only suspends the right of action on the original debt, until the maturity of such note, following the usual principle. *Taylor v. Perry*, 48 Ala. 240. A receipt of sufficient assets to pay his own debt is held an extinguishment of that debt where the doctrine of retainer prevails. 27 Ala. 130; 4 Dev. 103; 2 Hill, 340. But see 7 Heisk. 315. The representative cannot settle a claim for less than its face and appropriate the difference. The whole benefit accruing in any settlement belongs to the estate. *Cox v. John*, 32 Ohio St. 532; 330, *supra*; *Wms. Exrs.* 1842. A creditor cannot pay himself by withholding the property of the estate in his possession from the administrator. *Roumfort v. McAlarney*, 82 Penn. St. 193. See 190, *supra*. Yet proper offsets are allowable without special formality 92 Cal. 293, 28 P. 287.

442. **An executor or administrator whose conduct is honest and prudent**, and whose course conforms to law, does not become liable, in his private capacity, for debts of the deceased, or charges against the estate, concerning which he entered into no express undertaking. If assets fail to satisfy all claims in due order of preference, and he has used the assets properly, as far as they go, creditors of the estate cannot pursue him farther.<sup>1</sup>

443. **Payment or advancement out of the representative's private funds** gives him usually no right of subrogation to the original creditor, and he can acquire no undue advantage over heirs, devisees, and others interested in the estate, by doing so.<sup>2</sup> The debt becomes extinguished; and his proper mode of reimbursement is by way of account and balance with the estate.<sup>3</sup>

444. **As to the recovery of over-payment from a creditor** the operation of our American rule is different from that under the old English practice of preference.<sup>4</sup> Payments made without an order of the probate court, which classifies and allows claims, are in some States irregular; and in States which permit of a specified time for the presentation of claims, the executor or administrator incurs a personal risk if he pays any debt sooner, and if later claims, seasonably presented, show a deficiency of assets. While his own liability is none the less, in such a case, however, it is generally conceded that the excess may be recovered by him from the creditor thus imprudently overpaid; the inference being that only such payment as the estate could really afford was intended by him.<sup>5</sup>

445. **Heirs and next of kin are not to be held liable for debts of a deceased person**, apart from their own personal undertaking.<sup>6</sup>

<sup>1</sup> Kirby, (Conn.) 297; Rucker v. Wadlington, 5 J. J. Marsh. 238; Ritter's Appeal, 23 Penn. St. 95; Orange County v. Kidder, 20 Vt. 519.

<sup>2</sup> Gist v. Cockey, 7 Har. & J. 135; McClure v. McClure, 19 Ind. 185.

<sup>3</sup> Blank's Appeal, 3 Grant (Pa.) 192; Frary v. Booth, 37 Vt. 78; Hill v. Buford, 9 Mo. 869; Part VII, c. 2, as to allowances on account. See 446 as to an insolvent estate.

<sup>4</sup> 437, *supra*. For where he may prefer among creditors he has neither right nor occasion to recall his deliberate act. See 11 Paige, 265.

<sup>5</sup> Heard v. Drake, 4 Gray, 514; 17 Mass. 380; Beatty v. Dufief, 11 La. Ann. 74; 42 N. J. Eq. 628, 9 A. 577. But cf. Lawson v. Hausborough, 10 B. Mon. 147. Yet the creditor's equity is sometimes superior to his. Findlay v. Trigg, 83 Va. 539, 3 S. E. 142; 2 Rawle, 118, 19 Am. Dec. 627. As to relief in equity for mistake, see 59 S. E. 680, 146 N. C. 258.

<sup>6</sup> Where held responsible at all, the theory is, that the person has received property through the deceased which was fairly subject to the prior incumbrance of his just debts and the usual charges consequent upon his death. And, since the personalty constitutes the primary fund for that purpose, no liability can be imposed upon heirs-at-law, by reason of their inheritance, save upon a deficiency of personal assets. The general doctrine is here respected, that one person cannot, against his

446. Where the decedent's estate is found insolvent, all legal priorities among claimants should be strictly observed; and special provision is made, both in England and various parts of the United States, for a fair distribution of the estate, under such circumstances.<sup>1</sup> A reasonable time is allowed after one's appointment for representing the estate as insolvent.<sup>2</sup>

446a. As a general rule no property can be considered new assets, so as to revive debarred and unsatisfied claims, which has been already in the hands and under the control of the executor or administrator, or has been inventoried, or which is the product of such property, although it may have assumed or been converted into a new form.<sup>3</sup> But what are properly new assets may be applied to properly outstanding claims.<sup>4</sup>

446b. Third parties may lawfully buy in debts of the estate at a discount and collect their face value, or may purchase the claims of legatees, where no fraud appears, and the estate proves sufficiently solvent.<sup>5</sup>

consent, be rendered liable out of his own means for the indebtedness of another. See *Walker v. Byers*, 14 Ark. 246; local statutes as to inchoate claim, etc.; *Selover v. Coe*, 63 N. Y. 438.

<sup>1</sup> See *supra*, 425, 435. Embarrassing questions often arise in dealing with the insolvent estates of deceased persons; but, as statutes of this character prevail of purely local origin and application, no general exposition of the law appears requisite, beyond what is elsewhere stated of the precedence of claims, the abatement of legacies, marshalling assets, and creditors' bills in chancery. In modern English practice, the creditors' bill in chancery has become the usual resort for compelling a just distribution of assets among the creditors of a deceased insolvent, as already indicated. *Wms. Exrs.* 1037; *supra*, 437. See 19 Q. B. D. 92. The same course must be pursued in various American States, where chancery jurisdiction prevails, and no statute modifications have been introduced. A bill is thus brought to marshal assets and settle the estate. See *Johnson v. Corbett*, 11 Paige, 265.

The statutes of various New England and Western States adopt substantially the practice of Massachusetts, in relation to insolvent estates, which tend, of course, to relieve the personal representative from much of the responsibility of settlement, in such cases, which the English chancery methods, still retained in many of the older States, impose upon him. And thus the executor or administrator is not required to determine between allowing a claim against the estate or taking the risk of expensive litigation in regard to it. A summary and comparatively inexpensive method of adjusting and determining the indebtedness is provided. And instead of employing commissioners, some statutes direct the probate judge himself (at all events in estates below a specified value in assets) to perform the duty of examining and passing upon the claims presented. Whether the representative who ignorantly pays a creditor, and then finds the estate insolvent, may prove the debt in the name of the creditor, see 17 Mass. 380; *Heard v. Drake*, 4 Gray, 514; 10 B. Mon. 147.

<sup>2</sup> See local codes on this subject.

<sup>3</sup> *Littlefield v. Eaton*, 74 Me. 516.

<sup>4</sup> See *Quincy v. Quincy*, 167 Mass. 536, 46 N. E. 108. And see *Borer v. Chapman*, 119 U. S. 587, 30 L. Ed. 532 (domestic and ancillary).

<sup>5</sup> *Owen v. Potter*, 115 Mich. 556, 73 N. W. 977. Here the estate was embarrassed and generally believed insolvent, when letters were taken out. But as to a purchase by the executor or administrator, see 358; 32 Ohio St. 532. He must not collude with others for profit or speculation.

446c. Where an executor or administrator, instead of closing out his decedent's business continues it, even when authorized by will to do so, the trade debts will, as a general rule, reach only the trade assets; or, in other words, the property that was employed in the business, or that was the result of doing the business.<sup>1</sup>

<sup>1</sup> *Frey v. Eisenhardt*, 116 Mich. 160, 170, 74 N. W. 501; *Laible v. Ferry*, 32 N. J. Eq. 791. And see 325-327.



## CHAPTER II.

## SPECIAL ALLOWANCES TO WIDOWS AND MINOR CHILDREN.

447. The surviving wife's rights should be studied in connection with the law of husband and wife, which is well known to have changed its whole scope and bearing since the common law defined the rules of coverture centuries ago.<sup>1</sup>

448. As a claimant for the immediate support of herself and the young children of her deceased spouse, modern legislation deals liberally with the widow. The statutes relating to what is familiarly known as the widow's allowance provide, in general (though with variations of language), that such parts of the personal estate of a person deceased as the probate court, having regard to all the circumstances, may allow as necessities to his widow, for herself and family under her care, shall not be taken as assets for the payment of debts, legacies, or even (to follow the expression sometimes inaptly used) charges of administration.<sup>2</sup>

<sup>1</sup> What have been termed the widow's *paraphernalia*, or the suitable ornaments and wearing apparel of a married woman, remaining at the time of her husband's death, undisposed of by him, exist as hers, by exception to the old rule that all her chattels became her husband's, while all his remained his own. Schoul. Dom. Rel. § 208. Local statutes in these times sometimes provide expressly that the articles of apparel and ornament of the widow and minor children of a deceased person shall belong to them respectively. Community property set apart for the wife's homestead does not constitute assets. 120 Cal. 421, 52 P. 708. An exception of far wider consequence, under equity decisions and the recent married woman's legislation, is that of the wife's separate property. Schoul. Dom. Rel. cs. 7-10. A widow, moreover, may have rights, by way of distribution or dower, or as a legatee or devisee, in the estate which her husband left at his death.

<sup>2</sup> See local code. And see *Strawn v. Strawn*, 53 Ill. 263; *Sherman v. Sherman*, 21 Ohio St. 631; other cases *infra*; *Sawyer v. Sawyer*, 28 Vt. 245. The intent of such legislation is to make an express allowance from the deceased husband's estate for the benefit of his widow and minor children, whenever their circumstances require it, treating their immediate necessities as paramount to the claims of creditors. It is to be strictly considered as an allowance out of the decedent's personal property alone, and not extending to real estate unless the code provides accordingly. *Paine v. Paulk*, 39 Me. 15; *Hale v. Hale*, 1 Gray, 523. But cf. 152 Penn. St. 63, 25 A. 164. As to advice by the representative, see 75 N. C. 47. And in general, as an allowance to be made whether the husband and father died testate or intestate, and as a temporary and reasonable provision merely. See, however, *Mathes v. Bennett*, 1 Fost. 189; Iowa code. As for restricting to the amount of cash in hand, see 113 Penn. St. 11, 4 A. 60. The sum of \$1,000 out of an estate of \$12,000 is excessive. 58 N. H. 44. Cf. 14 Cal. 73. But where mortgaged realty of the decedent sold for less than \$200 above the mortgage of \$100, the widow may have the rest to the exclusion of a tax lien. 109 Penn. St. 75. An allowance may be made although there are no children, and a legacy has been left to the widow. *Moore v. Moore*, 48 Mich. 271, 12 N. W. 180. Under some codes the same court may make an allowance or set off specific property. *McReynold's Estate*, 61 Iowa, 585, 16 N. W. 729. The widow of a non-resident cannot

449. To relieve immediate distress is the usual main intent of such legislation; to provide necessities for a widow and young orphans, as far as may be, until the estate is fully settled, or one can make other arrangements for support.<sup>1</sup> But the allowance, though evidently designed for temporary relief, is not confined to cases of absolute and permanent destitution and slender estates; for a widow who, on a final division of the estate, is likely to receive a considerable competence, may be without the usual means of comfortable livelihood meanwhile; and such cases the judge appears fully competent to relieve.<sup>2</sup> That such allowance is not to be deemed, in any sense, as the judge's gift, or as a means of rectifying any apparent injustice to which one may be exposed by the statute of distributions or the testator's will, appears certain as codes usually stand.<sup>3</sup>

450. Maintenance for a particular period is sometimes specified.<sup>4</sup>

451. The widow's statute allowance is usually accorded priority over all claims of general creditors; it is sometimes preferred even to the expenses of administration and funeral;<sup>5</sup> though, in practice, a probate court will generally reserve enough for such prior and

claim out of local assets although she comes into the ancillary jurisdiction after her husband's death. 97 N. C. 112, 2 S. E. 668; 76 Ala. 521. Nor can proceeds of land outside the jurisdiction be charged with the widow's allowance. 174 Ill. 52, 43 L. R. A. 403, 50 N. E. 1083. But as to her *bona fide* domicile, though her husband died a non-resident, see 57 S. E. 372, 144 N. C. 600, 11 L. R. A. (N. S.) 361. See 28 La. Ann. 872 (sum fixed).

<sup>1</sup> Hollenbeck v. Pixley, 3 Gray, 521; Foster v. Foster, 36 N. H. 437; 165 Mass. 157, 42 N. E. 565. It is not intended to furnish the widow with a capital for business purposes, nor to establish a fund from which she may derive a permanent income. *Ib.*

<sup>2</sup> Indeed, in some States, it is plainly decided that even a rich widow may claim the allowance; and that the statute provision is of universal application, the discretion of the court extending only to the amount of the provision. Strawn v. Strawn, 53 Ill. 263; Thompson v. Thompson, 51 Ala. 493; 100 Cal. 593, 35 P. 341; 152 Cal. 274, 92 P. 643; Sawyer v. Sawyer, 28 Vt. 245. But according to the better opinion, an allowance may be refused where no good reason is shown for granting it. Hollenbeck v. Pixley, 3 Gray, 524; Kersey v. Bailey, 52 Me. 199.

The language of the local statute is of consequence, however, in determining its scope and purpose. Poster v. Foster, 36 N. H. 437; 1 Post. (N. H.) 189.

<sup>3</sup> 36 N. H. 437; 3 Gray, 525.

<sup>4</sup> The statutes of various States provide explicitly for "a year's support," or the maintenance of widow and children for one year out of the deceased husband's estate. Cole v. Elfe, 23 Ga. 235; 61 Ga. 410; 1 Swan, 441; Rocco v. Cicalla, 12 Heisk. 508; Grant v. Hughes, 82 N. C. 216, 697. Such an allowance appears to be properly claimed, as such statutes often run, by any widow for the period specified, regardless of her other means of support. Wally v. Wally, 41 Miss. 657. But, in such case, the property actually consumed before the application for support should be taken into account. Blassingame v. Rose, 34 Ga. 418; 36 Ga. 194. Cf. as to delayed administration, Rogers, *Ex parte*, 63 N. C. 110. In lieu of the year's provision, or support, a sum of money may sometimes be awarded. 12 Sm. & M. 662. See 456. Land is sometimes set apart for her under the local code. 56 S. E. 1025, 127 Ga. 679.

<sup>5</sup> Kingsbury v. Wilmarth, 5 Allen, 144.

essential charges.<sup>1</sup> As a rule, this immediate allowance is quite independent of one's prospective distributive share, legacy, or provision under a will.<sup>2</sup>

452. **The allowance to widow and children being duly decreed,** the executor or administrator in charge of the estate should make payment accordingly, regarding the statute dignity of the claim, and charging the sum in his account; otherwise the claim may be

<sup>1</sup> See *McCord v. McKinley*, 92 Ill. 11; *Giddings v. Crosby*, 24 Tex. 295; *Elfe v. Cole*, 26 Ga. 197. A secured creditor is not to be thus deprived of rights which he can enforce without the aid of an administrator or executor. See 430. Such allowance may take precedence of a tax lien. 109 Penn. St. 75. Of general creditors and judgment liens: but as to other liens and equities she takes as her husband held it. 95 N. C. 504. The widow cannot be postponed to a creditor's claim. 67 Iowa, 110, 24 N. W. 746. And if the widow surrenders exempt property to her husband's creditors where the estate was solvent in fact, her allowance should be made her. 65 Wis. 551, 27 N. W. 351; 456, *post*.

<sup>2</sup> While a mere advancement would by no means meet all necessitous cases, the court, in some States, may at discretion treat the allowance to a widow as on such a footing; which, however, appears contrary to the general policy of such legislation. *Mathes v. Bennett*, 1 Fost. 189. And cf. *Davis v. Davis*, 63 Ala. 293.

According to local statutes as to this allowance, must appear the bearing of the decedent's insolvency. In some States, paying a portion of the assets for the support of the widow and children, when the estate is insolvent, is not justified. *Hieschler, Re*, 13 Iowa, 597. On the other hand, in States which confide the amount amply to the discretion of the court, and accord to this allowance an express precedence, insolvency is no barrier; and it is not uncommon, where the husband has died insolvent, leaving few assets, for the whole of the personal property to be thus awarded to the widow (less, perhaps, the necessary preferred charges), whereby is afforded an expeditious means of settling a small and embarrassed estate. *Buffum v. Sparhawk*, 20 N. H. 81; 15 Mass. 183; *Johnson v. Corbett*, 11 Paige, 265; *Hampson v. Physick*, 24 Ark. 562. And as to "a year's support," see *Elfe v. Cole*, 26 Ga. 197; *Nelson v. Smith*, 12 Sm. & M. 662. See 96 Cal. 584, 31 P. 915. Excessive amount reduced. 155 Mass. 141, 29 N. E. 371. The fact that friends relieve by their charity does not debar allowance. 155 Mass. 153, 29 N. E. 375.

The nature and circumstances of this allowance require that it should be promptly sought. Ordinarily, the application should be made as soon as the inventory of the estate is returned, and the court has the means of judging how much should be granted. 11 Fost. 182. And it should precede the full administration of the assets. The petition and proceedings for allowance are simple. Notice to the administrator or executor seems always highly proper; and yet, in conformity with the local statute, an *ex parte* proceeding is in some States clearly sanctioned. *Morgan v. Morgan*, 36 Miss. 348; 152 Cal. 274, 92 P. 643. Cf. *Wright v. Wright*, 13 Allen, 207. The amount of the widow's separate property and means, the circumstance that she is accustomed or able to earn her own support or the contrary, the number and respective ages of her children,—all these, as well as the value of the estate, and the prospective distribution, are facts for the court to consider, as material to the case. 10 Met. 170; *Hollenbeck v. Pixley*, 3 Gray, 525; *Kersey v. Bailey*, 52 Me. 198; *Duncan v. Eaton*, 17 N. H. 441.

The discretion of the judge of probate is considered a legal discretion, to be judiciously exercised, and subject (except, perhaps, in extreme instances) to the revision and correction of the supreme court. *Piper v. Piper*, 34 N. H. 563; *Cummings v. Allen*, 34 N. H. 194; *Kersey v. Bailey*, 52 Me. 198. Cf. local statute.

The widow may have a second allowance, provided such allowance be just, at any time before the personal estate is exhausted. *Hale v. Hale*, 1 Gray, 518; 67 Cal. 349, 7 P. 733. A periodical allowance may be diminished by the judge on good cause, but not retroactively. *Baker v. Baker*, 51 Wis. 538, 8 N. W. 289; 53 Iowa, 467, 5 N. W. 685.

enforced, after a demand and refusal, by action brought by the claimant against such representative.<sup>1</sup>

453. Various causes may bar the widow, or deprive her of this allowance.<sup>2</sup>

454. The widow's allowance is so temporary in its nature and so personal in its character that where the widow dies before it is granted, the allowance is lost, even though proceedings relative to the grant are still pending; nor does the right usually survive or go to her personal representative.<sup>3</sup> Remarriage, too, before allowance, is held to debar her.<sup>4</sup> But, as to minor children, as well as herself, the state of things when her husband died is usually the criterion for relief.<sup>5</sup>

455. Allowance for minor children being here kept in view, legislation such as we are considering not only provides that the allowance to the widow shall be for herself and the family under her care, but, in some States, makes express allowance to the minor children, in case there is no widow.<sup>6</sup> Statutes authorizing one

<sup>1</sup> *Drew v. Gordon*, 13 Allen, 120; *Godfrey v. Getchell*, 46 Me. 587. Payment or delivery having been made in good faith, in accordance with the decree, the executor or administrator is entitled to have credit for the same in his accounts. *Richardson v. Merrill*, 32 Vt. 27. See further, *Haugh v. Seabold*, 15 Ind. 343.

<sup>2</sup> Such as undue delay in petitioning, to the injury of others. *Dease v. Cooper*, 40 Miss. 114; *Kingman v. Kingman*, 11 Post. 182. Cf. *Miller v. Miller*, 82 Ill. 463. Misconduct of the wife, such as adultery or desertion, though not a separation without fault on her part. *Cook v. Sexton*, 79 N. C. 305; 132 Ind. 403; 107 N. C. 171, 12 S. E. 60; *Slack v. Slack*, 123 Mass. 423. See 31 La. Ann. 854; *Chase v. Webster*, 168 Mass. 228, 46 N. E. 705. The inconsistent acceptance of a distributive share or succession. *Claudel v. Palao*, 28 La. Ann. 872. Beneficial provisions under a will, which the widow does not renounce, in some instances; especially when made in lieu of all such claims. *Turner v. Turner*, 30 Miss. 428; 54 N. J. Eq. 632, 35 A. 456. Cf. 57 Wis. 382, 15 N. W. 425; *Williams v. Williams*, 5 Gray, 24. As to a direction in one's will that his family be provided for, etc., see *Reid v. Porter*, 54 Mo. 265; *Riley Ch.* 152. Cf. 43 Neb. 463, 61 N. W. 756; *Williams v. Williams*, 5 Gray, 24. But the mere release of all claims upon her husband's estate, under a marriage contract, is held no bar. *Blackington v. Blackington*, 110 Mass. 461. And see *Sheldon v. Bliss*, 4 Seld. 31; *Phelps v. Phelps*, 72 Ill. 545; *Pulling v. Durfee*, 85 Mich. 34, 48 N. W. 48. But see *Tierman v. Binns*, 92 Penn. St. 248; 84 N. E. 192, 233 Ill. 116, 122 Am. St. Rep. 149; 115 N. W. 560, 81 Neb. 38. A separation deed, followed by separation, may, however, debar, and so may a marriage settlement when suitably expressed. For litigation on such points, see *Speidel's Appeal*, 107 Penn. St. 18; 66 Iowa, 79, 23 N. W. 273; 38 Ark. 261; 151 Ind. 200, 51 N. E. 328. Her separate estate is no bar where, at all events, the obligatory support still rested upon the husband. *Thompson v. Thompson*, 51 Ala. 493; *Wally v. Wally*, 41 Miss. 657.

<sup>3</sup> *Adams v. Adams*, 10 Met. 171; *Dunn, Ex parte*, 63 N. C. 137; *Tarbox v. Fisher*, 50 Me. 236. *Contra*, 4 Ohio St. 292; *Bane v. Wick*, 14 Ohio St. 505. And see 77 Ga. 232. Otherwise if she dies after a decree. *Drew v. Gordon*, 13 Allen, 120.

<sup>4</sup> *Hamilton's Estate*, 66 Cal. 576, 6 P. 493; 117 Cal. 509, 49 P. 463. See 98 Ga. 366, 25 S. E. 831.

<sup>5</sup> *Hayes, Re*, 112 N. C. 76, 16 S. E. 904.

<sup>6</sup> Mass. Gen. Stats. c. 96, § 5 (\$50 limit to a child). And see *Leshner v. Wirth*, 14 Ill. 39.

year's support likewise give the children the right to apply by guardian for the provision in emergencies.<sup>1</sup>

456. Our American statutes enumerate specific articles of property in connection with, or as a substitute for, the money allowance to widow and minor children.<sup>2</sup> In various States the widow is entitled to all the property of her deceased husband which is exempt by law from sale on execution.<sup>3</sup> This right appears to exist whether the estate was testate or intestate, solvent or insolvent, and so that the exempt property shall not go to the executor or administrator; but the widow's claim is usually confined to exempt property of her late husband which remained on hand, as a part of his estate, at the time of his death.<sup>4</sup>

<sup>1</sup> *Edwards v. McGee*, 27 Miss. 92. Where minor children do not live with, and are not maintained by, the widow, the probate court may sometimes apportion the provision for the benefit of all concerned. *Womack v. Boyd*, 31 Miss. 443. See 70 Ga. 733; 450, *supra*; 74 Ga. 795; 73 Ga. 66; 68 Ga. 66, 641; 70 Ala. 381. "Grandchildren" may be included. 35 La. Ann. 371. And see *Cheney v. Cheney*, 73 Ga. 66; 144 Mo. 258, 46 S. W. 135; 105 Ga. 305, 31 S. E. 186; 67 N. H. 512, 38 A. 19. Such statutes and their rule the representative must carefully follow.

<sup>2</sup> Thus, are excepted from assets of the deceased, in addition to this allowance, provisions and other articles necessary for the reasonable sustenance of his family, and the use of his house and the furniture therein, for forty days after his death. See 457; Mass. Gen. Stats. c. 96, § 5. And see *Carter v. Hinkle*, 13 Ala. 529; *Graves v. Graves*, 10 B. Mon. 41. Their own articles of ornament and wearing apparel are expressly confirmed to widow and minor children. See Schoul. Dom. Rel. §§ 217-219; *supra*, 447. And, under some codes, the widow may take articles of personal property, at their appraised value, to a stated amount. *Hastings v. Myers*, 21 Mo. 519; *Bonds v. Allen*, 25 Ga. 343; *Darden v. Reese*, 62 Ala. 311; *Leib v. Wilson*, 51 Ind. 550; *Fellows v. Smith*, 130 Mass. 376. Such permission is presumably to take as on account of her share in the estate; but the local statute sometimes extends it to a sort of special gift from the estate.

<sup>3</sup> 51 Ala. 493; *Taylor v. Taylor*, 53 Ala. 135; 50 Ala. 210 (or money in lieu); *Whitely v. Stevenson*, 38 Miss. 113; 7 Heisk. 232; 92 Tenn. 715, 23 S. W. 66; 151 Penn. St. 577, 25 A. 146; 79 Tex. 189, 14 S. W. 915, 15 id. 471.

<sup>4</sup> *Johnson v. Henry*, 12 Heisk. 696. All such property going directly to the widow, the representative who converts it is a wrong-doer, and makes himself individually liable. *Carter v. Hinkle*, 13 Ala. 529; *Morris v. Morris*, 9 Heisk. 814. Unless he is required to take a temporary custody of such property, as, for instance, for the purpose of making his inventory. *Voelckner v. Hudson*, 1 Sandf. 215. The administrator cannot pursue such property. *Wilmington v. Sutton*, 6 Iowa, 44. The selection of property by the widow vests her with the title at once. 73 Ala. 542; 117 Ala. 432, 23 So. 521. Cf. 77 Mo. 162 (absolute right). And see 11 Tex. 249.

As to provisions relating to a widow who is "housekeeper," and "head of a family," see 14 Ill. 39; 27 Ill. 129; 6 Iowa, 137; 27 Iowa, 371. And as to "implements of industry," see 72 Mo. 656; 122 Cal. 434, 55 P. 158. Specific articles to be set apart to the widow will be found enumerated in certain codes. *York v. York*, 38 Ill. 522; *Brigham v. Bush*, 33 Barb. 596; 1 Sandf. (N. Y.) 215; 62 Md. 560; 134 Penn. St. 377, 19 A. 684. The cases are numerous but turn upon the construction of local statutes of varying expression.

So far as it may be said that the right to specific articles under a statute vests immediately upon the death of the husband, and is not contingent or subject to allotment or grant under the court's direction, the right to these articles, on the widow's death, without receiving them, devolves upon her executor or administrator, who may pursue the property accordingly. *Hastings v. Myers*, 21 Mo. 519. And see *Vedder v. Saxton*, 46 Barb. 188.

457. **The widow's right to use the dwelling house for forty days** after her husband's death is known as the widow's *quarantine*, a right preliminary to assigning her dower.<sup>1</sup> This right has been expressly recognized by statute in some of the United States, apart from its existence by force of the common law alone;<sup>2</sup> our legislation tending, moreover, to afford the same shelter to the minor children, and to extend the privilege to the use of the furniture therein, and the consumption of provisions and articles necessary to sustenance.<sup>3</sup>

457a. **The widow's election to take against her husband's will** deserves notice. Our local statutes enlarge upon the old doctrine of the widow's dower (which might not be absolutely willed away from her by her husband) by allowing her to elect formally to take under or against her husband's will; and what she shall take in the latter alternative is defined by the same local statute.<sup>4</sup> She must make her election within a stated time—such as a year or less—or she shall be deemed to have elected to take as the will provides; and, in general, lapse of time, her conduct, negative as well as positive, may properly debar her from electing.<sup>5</sup>

<sup>1</sup> 2 Bl. Com. 135; Magna Charta, Hen. VIII.

<sup>2</sup> 35 Ala. 328; *Whaley v. Whaley*, 50 Mo. 577; *Craige v. Morris*, 25 N. J. Eq. 461; *Calhoun v. Calhoun*, 58 Ga. 247; 96 Ga. 374, 23 S. E. 312; *Young v. Estes*, 59 Me. 447; *Doane v. Walker*, 101 Ill. 628; 11 Paige, 265. The husband ought to have been in actual possession of such house. 56 N. J. Eq. 126, 38 A. 648; 50 N. J. Eq. 325, 25 A. 181.

<sup>3</sup> 456, *supra*. The widow's statute right is not always restricted to a personal continuance in the house, but she may rent or occupy during the statute period, as may best promote her comfort. *Conger v. Atwood*, 28 Ohio St. 134, 22 Am. Rep. 362. But cf. *Fisk v. Cushman*, 6 Cush. 20, 52 Am. Dec. 761. See as to crops planted and harvested within the year, 81 Ind. 292; *Hoover v. Agnew*, 91 Ind. 370. And see as to growing crops, 39 N. J. Eq. 506; 307. See further as to strict statute limit (sixty days), 78 N. E. 1112, 186 N. Y. 537; 106 S. W. 949, 84 Ark. 557, 120 Am. St. Rep. 84 (a personal right and not transferable). The widow in possession under statute is not bound to keep down interest, pay taxes, or make necessary annual repairs. *Spinning v. Spinning*, 41 N. J. Eq. 427, 5 A. 278; 40 N. J. Eq. 30. If she receives rent she should account for it, and is credited for taxes and repairs. 39 N. J. Eq. 506. But she should pay water rates. 43 N. J. Eq. 215, 10 A. 270.

The lien of a mortgage on land appears not to be affected under such statutes. *Kauffman's Appeal*, 112 Penn. St. 645, 4 A. 20. As to acts of the widow, like selling timber and building a new house, see 27 W. Va. 750; 72 Ga. 665. The removal of the children by their guardian does not affect the widow's right to occupy. *Zoellner v. Zoellner*, 53 Mich. 620, 19 N. W. 556. The statute period in various States lasts until dower is assigned to the widow. *Davenport v. Devenaux*, 45 Ark. 341.

<sup>4</sup> *Mathews v. Mathews*, 141 Mass. 511, 6 N. E. 776; 39 Hun, 252; *Brokaw v. Brokaw*, 41 N. J. Eq. 304, 7 A. 414. Dissent from the will not necessary for securing a statutory exemption. *Supra*, 456; 73 Ala. 578. See as to dower claim in addition to provision by will, 144 Mass. 564, 12 N. E. 354; 104 N. Y. 125, 58 Am. Rep. 494, 9 N. E. 868.

<sup>5</sup> *Hovey v. Hovey*, 61 N. H. 599; *Mathews v. Mathews*, 141 Mass. 511, 6 N. E. 776; 70 Mo. 189. See 43 W. Va. 226, 27 S. E. 378. As to her election of a homestead in lands, see *Davidson v. Davis*, 86 Mo. 440. Where a widow is of unsound mind, the court in her interest may elect for her. *Penhallow v. Kimball*, 61 N. H. 596; Van

## CHAPTER III.

## LEGACIES, THEIR NATURE AND INCIDENTS.

458. **The subject of legacies is, properly speaking, a branch of the law of wills.**<sup>1</sup> It may be advantageous to set here before the reader the nature of legacies and their chief incidents; for, to this extent, at least, every executor should make himself familiar with this interesting topic of our jurisprudence.

459. **A legacy is a gift or disposition in one's favor by a last will.** We commonly apply the word to money or other chattel gifts, though a broader reference is not inappropriate; "bequest" being the more precise term for a testamentary gift of personalty.<sup>2</sup> Next to seeing that with widow's allowance all just debts and charges are amply provided for, one who administers under a will should attend to the payment or delivery of legacies in accordance with law and the last wishes of his testator.<sup>3</sup>

460. **Various classes of persons have been treated as disqualified from receiving legacies under statutes; the list being quite similar**

*Steenwyck v. Washburn*, 59 Wis. 483, 48 Am. Rep. 432, 17 N. W. 289. As to recalling assent, and then electing against the will, see 97 N. C. 236, 1 S. E. 452; 149 Ind. 363, 48 N. E. 642. But the widow is not bound by her election made in ignorance of the facts which should influence it. *Elbert v. O'Neil*, 102 Penn. St. 302. She cannot waive provisions in her husband's will which are not solely for her benefit. *Leonard v. Haworth*, 171 Mass. 496, 51 N. E. 7. Nor can she elect partly to accept and partly to reject what the will offers her. *Crawford v. Bloss*, 114 Mich. 204, 72 N. W. 148. The widow's right of election is purely personal, and cannot be exercised by others after her death. 185 Penn. St. 174, 39 A. 818. She is bound by her acceptance of any provision expressly made "in full satisfaction and recompense." 140 N. Y. 421; 66 Vt. 46, 28 A. 419. Cf. 99 Mich. 128, 57 N. W. 1097. See further, 143 Mass. 340, 35 N. E. 660; *White v. Dance*, 53 Ill. 413; *Stockton v. Wooley*, 20 Ohio St. 184; 77 N. C. 367; 51 Mo. 261; 90 Penn. St. 384, 35 Am. Rep. 666; 70 Mo. 189; 52 Wis. 295, 9 N. W. 162.

In some States the husband has now a corresponding right of waiver under his wife's will. Consult the local statute in all cases of election against the spouse's will. And see Book I, *supra*, 424-426.

<sup>1</sup> Many intricate problems of construction arise in the equity courts under this head which an executor or administrator, as such, may never be required to solve; but, where embarrassment arises in the interpretation of a testamentary trust, they who administer that trust, whether trustees or executors, must seek competent legal advice. See 1 Jarm. Wills; Wms. Exrs. 1051, etc.; Book I, Part VI, *supra*.

<sup>2</sup> Book I, 3-5, *supra*.

<sup>3</sup> While, by "legacy," our law signifies a testamentary disposition,—and every testamentary disposition is admitted to be ambulatory, and revocable by the testator during the testator's natural life,—it does not follow that a legacy is necessarily devoid of consideration. In fact, a legacy is sometimes left in satisfaction of a valid debt owing by the decedent or upon other consideration; though the presumption is that one gives by will as a bounty. Book I, Part V. And see 432, 469, 490.

to that which pertains to the office of executor.<sup>1</sup> Prohibited classes, however, must be defined by law;<sup>2</sup> for every person is capable of taking a legacy as a rule, excepting such as are thus expressly forbidden.<sup>3</sup> Even an unborn child may by proper designation under the will be made a legatee.<sup>4</sup>

461. All legacies are either *general* or *specific*, as defined by the books. A general legacy is one which does not necessitate delivering any particular thing or paying money out of any particular portion of the estate. But a specific legacy is the converse of this; or where a particular thing must be delivered, according to the terms of the bequest, or money paid out of some particular portion of the estate.<sup>5</sup> One important consequence of this distinction

<sup>1</sup> Book I, 21-27, 35, *supra*.

<sup>2</sup> As to the right of a corporation to take, it is not essential that the corporate organization be complete or final when the testamentary provision takes effect; but associations clearly identified may, like two or more persons, stand entitled to a bequest; and such association may procure afterwards an act of incorporation from the legislature in confirmation of its right. *Nye v. Bartlett*, 4 Met. 378; *Zimmerman v. Anders*, 6 W. & S. 218, 40 Am. Dec. 552; *England v. Prince George's Vestry*, 53 Md. 466. So, too, a corporation named as legatee or devisee not unfrequently resorts to the legislature, after the death of the testator, but before the money is payable, to procure such amendment of its charter as may clearly remove all restraint upon its capacity to take the benefits of the will in question. See *Wms. Exrs.* 1052, Perkins's note; 4 Dem. 271. A corporation's right to take by will is subject to the general laws of the State passed after the incorporation. *Kerr v. Dougherty*, 79 N. Y. 327. And see *England v. Parish Vestry*, 53 Md. 466.

Corporations, public or private, are not so readily presumed capable of taking lands under a will as personal property; the rule of policy is different in the two instances, and the law of *situs* prevails as to land. It is held, in construction of the New York statute, that a devise of lands in New York to the government of the United States is void. *United States v. Fox*, 94 U. S. 315, 24 L. Ed. 192; *Fox, Matter of*, 52 N. Y. 530, 11 Am. Rep. 751. But the bequest to the United States, whence was derived the Smithsonian Institution, was sustained in the English chancery courts, this being a bequest of personal property.

<sup>3</sup> 1 Roper Legacies, 28; *Wms. Exrs.* 7th ed. 1052. Among persons formerly disqualified at English law were those who denied the Scriptures, traitors, and artificers going abroad. Such disqualifications have no application to the United States, and the modern sense condemns them. See as to subscribing witnesses to a will, Book I, 357.

<sup>4</sup> *Chambers v. Shaw*, 52 Mich. 18, 17 N. W. 223; 57 Mich. 265, 23 N. W. 807. A devise to grandchildren, the immediate issue of persons in being at the time of a will, is valid. *McArthur v. Scott*, 113 U. S. 340, 28 L. Ed. 1015. See 465. Cf. *Wheeler v. Fellows*, 52 Conn. 238.

<sup>5</sup> 1 Roper Legacies, 170; *Wms. Exrs.* 1158. "A specific legacy," says Langdole, M. R., "is something distinguished from the rest of the testator's estate; and it is sufficient if it can be specified and distinguished from the rest of the testator's estate at the time of his decease." 3 Beav. 342. There is an intermediate sort of legacy known as the "demonstrative legacy," according to writers on the law of Wills. *Wms. Exrs.* 1160; 4 Ves. 555. But the two main classes are as stated above; while it is to be remembered that their several incidents are variable according to a testator's declared wishes. See *Pratt, Re*, (1894) 1 Ch. 491. And see *Kelly v. Richardson*, 100 Ala. 584, 13 So. 785.

If a testator bequeaths to A. a horse or a gold ring, this indefinite expression constitutes a general legacy; for we may infer that the executor is left free to procure



between general and specific is, that, should the assets prove deficient, general legacies must abate, while a specific legacy does not;<sup>1</sup> and, on the other hand, should the specific legacy fail, or come short, for want of the identical things described, the legatee can claim no satisfaction out of the general personal estate.<sup>2</sup> In some instances, therefore, the specific legatee is the better off, and in others the worse. Since, however, specific bequests, on the whole interfere with a just and uniform settlement of an estate as one whole, courts of equity lean against pronouncing legacies specific in doubtful cases.<sup>3</sup>

462. The bequest of all one's personal estate, or the devise and bequest of all the residue, both personal and real, cannot be treated as specific; but such a disposition, from its own terms and sense, is general and residuary, and subject to the usual payment of

something which shall answer that description out of the funds in his hands, provided none be left at the testator's decease. But, if the bequest is expressed, "my roan horse," "the gold ring which C. D. gave me," or (with reference, not to a present possession, but possession at the time of one's decease) "whatever horses shall be in my stable," or "all the books which may be in my library," or "all the furniture which shall be contained in my dwelling-house," this legacy is a specific one. To the latter class belongs a bequest of all the stock in the public funds, all the first-class railroad bonds, or all the savings bank deposits to which the testator may be entitled at the time of his death; and so, too, with any designated portion thereof. *Bothamley v. Sherson*, L. R. 20 Eq. 304; *Wms. Exrs.* 1162; *Ludlam's Estate*, 13 Penn. St. 189; *Ratto's Estate*, 86 P. 1107, 149 Cal. 552; *Snyder's Estate*, 66 A. 157, 217 Penn. 71, 118 Am. St. Rep. 900, 11 L. R. A. (N. S.) 49 (something distinguished from all other things of the same kind); *Johnson v. Gross*, 128 Mass. 433; *Fontaine v. Tyler*, *infra*. *Herring v. Whittam*, 2 Sim. 493; 22 Pick. 299. As to specific bequests of money (not frequent), see *Lawson v. Stich*, 1 Atk. 507; *Perkins v. Mathes*, 49 N. H. 107. A specific legacy may be given under a will, with the substitution besides of a general pecuniary legacy in case of its failure, to be satisfied in a specific manner. *Fontaine v. Tyler*, 9 Price, 94. See *Norris v. Thomson*, 2 McCarter (N. J.) 493; *Mahoney v. Holt*, 19 R. I. 660, 36 A. 1; *Nottage, Re*, (1895) 2 Ch. 657. The balance of a partnership settlement, not drawn out of the concern, or the good-will of a business, may be specifically bequeathed, in whole or in part; and so may a debt or claim in favor of the estate; and insolvency of the concern or of the debtor renders the legacy worthless. *Ellis v. Walker*, Amb. 309; *Fryer v. Ward*, 31 Beav. 602; 2 Del. Ch. 200; *Farnum v. Bascom*, 122 Mass. 282.

It should be observed, however, that no direction out of what fund the legacy shall be raised will render that legacy specific, unless the clear intent was to transfer all or a part of the same identical fund. 2 Redf. Wills, 135. Nor will a legacy be rendered specific, by directions incidental to a general bequest; such as a certain sum of money to be laid out in mourning rings; or \$1,000 to recompense the executor, or for cha ity, or to be invested in a prescribed class of securities, or payable in cash. *Wms. Exrs.* 1162; 9 Price, 226; 1 Atk. 507; *Edwards v. Hall*, 11 Hare, 23; 1 Ves. & B. 364. A reference, on the other hand, to the fact of one's death for ascertaining his legacy—as in the bequest of "all the horses which I may have in my stable at the time of my death"—does not render the gift other than specific. *Bothamley v. Sherson*, L. R. 20 Eq. 309.

<sup>1</sup> Except for creditors as a last resort. 490.

<sup>2</sup> See *post*, 471; *Wms. Exrs.* 1159.

<sup>3</sup> See Lord Chancellor in *Ellis v. Walker*, Amb. 309; *Wms. Exrs.* 1160. Yet the testator's clear intent must prevail. See 2 Coll. 435.

debts and legacies.<sup>1</sup> But there may be a specific bequest of all one's estate in a particular locality;<sup>2</sup> so, too, the specific bequest of what shall remain of a specific and identical thing or fund, after other legacies enumerated shall have come out of it, or specified incumbrances are removed.<sup>3</sup>

463. A bequest to further and carry into effect any illegal purpose, which the law regards as subversive of sound policy or good morals, and destructive to the fundamental institutions of society and the civil government, whether by disseminating such writings or otherwise, will, on general principle, be held void; and the executor is not justified in paying it.<sup>4</sup> Men's ideas as to civil polity or follies of belief are by no means immutable, however.<sup>5</sup>

464. Gifts to charitable uses had their origin in the Christian dispensation, and are found regulated by the Justinian code.<sup>6</sup> Our English law on this subject is controlled by the stat. 43 Eliz. c. 4,<sup>7</sup> since which enactment, English courts of equity have treated charitable bequests as properly restricted to the purposes therein enumerated, and to such, besides, as by analogy may be deemed within its spirit or intendment.<sup>8</sup> In this liberal sense, gifts to charitable

<sup>1</sup> Wms. Exrs. 1172-1177; *Fairer v. Park*, L. R. 3 Ch. D. 309. Nor is a general residuary clause to be otherwise construed, merely because some of the particulars of which it shall consist are enumerated in the will. *Taylor v. Taylor*, 4 Hare, 628.

<sup>2</sup> *Nisbett v. Murray*, 5 Ves. 150; 2 Vern. 688; Wms. Exrs. 1172.

<sup>3</sup> *Ib.*

<sup>4</sup> 2 Beav. 151; 2 My. & K. 697; 1 Salk. 162; *Habeshon v. Vardon*, 7 E. L. & Eq. 228. And see Book I, 22.

<sup>5</sup> Whenever a charitable intent appears on the face of the will, but the terms used are broad enough to allow of applying the fund either in a lawful or unlawful manner, the gift will be supported, and its application restrained within the bounds of law. *Jackson v. Phillips*, 14 Allen, 556. And, where some bequests, in a duly probated will, are invalid, and must fail, the valid provisions should nevertheless be executed. *Bent's Appeal*, 38 Conn. 26.

As to bequests for "superstitious uses," so called, the policy of our law has greatly changed in the course of two centuries, consistently with the advance of religious toleration. See, in detail, Wms. Exrs. 1055; Book I, 21, *supra*.

<sup>6</sup> Code Just. I, 8.

<sup>7</sup> 1 Jarm. (ed. 1861), 192. This statute specifies the following gifts as charitable: For the relief of aged, impotent, and poor people; for the maintenance of sick and maimed soldiers and mariners; for schools of learning, free schools and scholars in universities; for the repair of bridges, ports, havens, causeways, churches, sea-banks, and highways; for the education and preferment of orphans; for the relief, stock, or maintenance for houses of correction; for the marriages of poor maids; for the support and help of young tradesmen, handicraftsmen, and persons decayed; for the relief or redemption of prisoners or captives; for the aid or ease of poor inhabitants; and concerning payment of fifteens, setting out of soldiers and other taxes.

<sup>8</sup> "Charitable use" is a term not easily defined; nor does the statute of 43 Eliz. define, but rather illustrates by instances such as might vary from age to age. Lord Camden's definition (often quoted, but sometimes incorrectly ascribed to Lord Hardwicke) that a gift to charity is "a gift to a general public use, which extends to the poor as well as to the rich," seems to touch the vital point; namely, that the private benefaction should be well designed to promote some public object of utility. See *Jones v. Williams*,

uses are likewise sustained in all or most of the American States; our equity courts resting their jurisdiction upon this statute, as part of the law of England which the first settlers brought over with them; or else deriving it from that earlier common law founded in the precepts of the Christian religion, and the divine injunction that love of God be manifested in the love of our fellow-men—which such enactments serve only to explain and apply.<sup>1</sup>

465. There may be bequests void for uncertainty, or where principal and income are locked up too long.<sup>2</sup>

Amb. 651. Where such is the case, the disposition of English chancery has constantly been to bring the bequest by analogy within the purview of the statute, even though literal interpretation might have excluded it.

<sup>1</sup> 2 Story Eq. Jur. §§ 1155–1164; 2 Kent Com. 287, 288; *Burbank v. Whitney*, 24 Pick. 146, 35 Am. Dec. 312; 10 Allen, 177; Wms. Exrs. 1069, 1070, and Perkins's note. In *Jackson v. Phillips*, 14 Allen, 556, Gray, J., quotes approvingly the language used by Mr. Binney in arguing the *Girard Will Case*. See 28 Penn. St. 35. The New York doctrine of charitable uses is drawn from the common law and local statutes, irrespective of 43 Eliz. Denio, J., in *Williams v. Williams*, 4 Seld. 525.

The definiteness or indefiniteness of these charitable trusts is sometimes an important element in determining the validity of such gifts; as to whether the testator has given for some charity or is rather leaving his trustees to give or not, according to their own inclination. But our courts are not disposed to let a good public object fail if they can help it, where the testator's intention may be discovered and he has not confided too great discretion to those selected to carry out his wishes. See gift to meritorious widows and orphans to keep them from becoming paupers, in *Camp v. Crocker*, 54 Conn. 21, 5 A. 604; *Sowers v. Cyrenius*, 39 Ohio St. 29, 48 Am. Rep. 418. Concerning a gift to such charitable purposes as A. shall deem proper, etc., cf. 53 Conn. 242, 5 A. 687; *Prichard v. Thompson*, 95 N. Y. 76, 47 Am. Rep. 9; *Goodale v. Mooney*, 60 N. H. 528, 49 Am. Rep. 334. And see 14 R. I. 412; 52 Conn. 412. Some of our later codes check corporate charitable bequests by pronouncing them void unless made within a prescribed period—e.g., two months—before the testator's death. 154 N. Y. 190; Book I, 24.

<sup>2</sup> As to uncertainty, see *supra*, Book I, 591–597.

As to failure of a bequest when given to remain in bulk for some remote, unborn generation, in violation of the rule against perpetuities, see *supra*, Book I, 21. After some fluctuation in the decisions, the limitation finally fixed upon is the period of a life or lives in being at the death of the testator, and twenty-one years more; adding, in case of a posthumous child, a few months longer, to allow for the period of gestation. If a further postponement be attempted, the limitation is void. See *Rand v. Butler*, 48 Conn. 293; 169 Ill. 432, 48 N. E. 561, 49 id. 320; *Brandenburg v. Thorndike*, 139 Mass. 102, 28 N. E. 575; *Bailey v. Bailey*, 97 N. Y. 460. *Semble*, the "life or lives in being" may be those of strangers instead of beneficiaries. 97 N. Y. 460. The American rule against perpetuities is like the English, but local statute qualifications exist. Life or lives in being, without the addition of twenty-one years, is the limit of suspension in some State codes. 61 Wis. 469, 50 Am. Rep. 148, 21 N. W. 615; 20 Fed. R. 792; 102 N. Y. 161, 55 Am. Rep. 793, 6 N. E. 898. For a corresponding prohibition of *fidei commissum* under the Louisiana code, see 36 La. An. 754. Apart from local statute permission, a gift to keep family tombs in perpetual repair is objectionable under the general rule. *Coit v. Comstock*, 51 Conn. 352, 50 Am. Rep. 29; *Detwiller v. Hartman*, 37 N. J. Eq. 347; *Fite v. Beasley*, 12 Lea, 328; 79 Ala. 423, 58 Am. Rep. 596. And so as to funds left for a brass band to come to the grave every year and play dirges. 37 N. J. Eq. 347. For only gifts to charity are excepted.

Nor should income be locked up too long, to accumulate for distant posterity, and so as to debar immediate survivors of the decedent from receiving income as well as capital. See *Thellusson v. Woodford*, 4 Ves. 227. The usual rule applies (where no

466. Legacies may be absolute or conditional; and a condition annexed may be either precedent or subsequent, so that, on the one hand, the bequest may never take effect, or, on the other, it may take effect with the liability of being afterwards defeated.<sup>1</sup> Legacies, however, are usually absolute, or are so given without condition as to vest immediately and fully. Devises and legacies, moreover, may be vested or contingent, and may be given under such limitations as to confer an interest in possession to one, and an interest by way of remainder to another; thus giving rise to many abstruse questions not properly discussed in a treatise like this.<sup>2</sup>

467. Lapsed legacies deserve our passing attention. There is an implied condition, precedent to all legacies, founded in the ambulatory character of the will itself, during the maker's own life; namely, that the testator must first die, leaving the instrument as his last true will, before it can operate as such. The death of any legatee named therein before the testator, causes, therefore, his legacy to lapse; while, as just seen, the condition precedent, or contingency with which the bequest may have been coupled, may produce a lapse in various instances where the legatee dies after the testator. For a lapsed legacy is one which never vests: either (1) in consequence of the death of the legatee before the testator; or, (2) because, notwithstanding the legatee survive the testator,

statute intervenes) to capital and income alike. Mr. Thellusson's will gave a large fortune to accumulate in trust, income being added to principal, during all the lives in being at his decease, and for twenty-one years more; in other words, for the entire period permitted by the rule against perpetuities. Such was the public indignation in England at this heartless bequest, that Parliament passed an act (39 & 40 Geo. III, c. 98) which forbade accumulation thenceforth under trusts longer than the life of a grantor or settler, and the term of twenty-one years after his death, or during the minority of such as would otherwise be entitled under the will. This act, still styled the "Thellusson act," loads the testator's memory with a reproach which may have well outlasted the suspension of his benefaction. The restraints of this act apply not only to cases expressly providing for, but to such also as by implication result in, such accumulations. See 1 Jarm. Wills, 293. This act limits accumulation for charities as well as for individuals. Masterman, *Re*, (1895) 2 Ch. 184; (1895) App. 186. In the several United States, either there is corresponding local legislation on this point, or else the general restriction as to accumulating both capital and income prevails. 95 N. Y. 13, 103; 63 Wis. 529, 24 N. W. 161.

<sup>1</sup> See Wms. Exrs. 889; 1 Jarm. Wills, 799; Book I, 562, 598-600, *supra*. And see *Hammond v. Hammond*, 55 Md. 575; *Clayton v. Somers*, 27 N. J. Eq. 230.

<sup>2</sup> *Ib.* But every interest under a will vests at the decease of the testator, unless otherwise provided; and even an interest to take effect in possession after a precedent one, may vest simultaneously with it in right, so as to devolve upon the executors or administrators of any legatee who, having survived the testator, may die afterwards before his possession has vested; nevertheless, an interest which is clearly contingent must be so construed, however inconvenient to a beneficiary and his representatives

he dies before his interest can be said to have vested under the will. Lapsed legacies are most commonly of the former kind.<sup>1</sup>

468. **Whether legacies repeated in a will are meant to be cumulative or not is a question of testamentary intention; for, in the one case, the legacies are added together, while, in the other, a mere repetition of the bequest, or else (if they differ) a substitution, takes place.<sup>2</sup>**

469. **If a debtor leaves a legacy to his creditor this is not to be deemed a satisfaction of the debt, according to the better rule at this day, unless intent appears; though actual express intent must govern.<sup>3</sup>**

<sup>1</sup> Wms. Exrs. 1204-1206; 1 P. Wms. 83. And see *Maitland v. Adair*, 3 Ves. 231. As to a common-law distinction between lapsed devises and lapsed legacies, see *Moffet v. Elmendorf*, 152 N. Y. 475, 485, 46 N. E. 845, 57 Am. St. Rep. 529. Modern statute tends to abolish all such distinction, so that lapsed devises, like lapsed legacies, fall into the residue of the estate. *Ib.*

There are cases where the death of the legatee, subsequent to the testator's death, will cause the legacy to lapse, his interest not having vested in the meantime. Such is not the general rule; but, if the legatee die after his testator, and before payment, his own executor or administrator may demand the legacy of the testator's representatives. *Jersey v. Jersey*, 110 N. W. 54, 146 Mich. 660; 10 Ves. 13; Wms. Exrs. 1224; *Hester v. Hester*, 2 Ired. Eq. 330; *Traver v. Schell*, 20 N. Y. 89; next c. Yet, where the will expressly and absolutely postpones payment of the legacy until a later period than the testator's death, we are to inquire what is the intent of such a provision in this instance. *Eldridge v. Eldridge*, 9 Cush. 516; Wms. Exrs. 1224-1251.

The general rule at this day is that all devises or legacies are deemed to have lapsed where the beneficiary named dies in the testator's lifetime: in which case the gift falls into the residuum or becomes intestate estate, as the case may be. A testator dies intestate even as to a lapsed devise or bequest contained in a residuary clause. *Gorgas's Estate*, 166 Penn. St. 269, 31 A. 86; *Morton v. Woodbury*, 153 N. Y. 243, 47 N. E. 283. And see *Jackson v. Alsop*, 67 Conn. 249, 34 A. 1106; *Wood v. Seaver*, 158 Mass. 411, 33 N. E. 587. And see local statute. But by a substitutional gift, if the will so directs, the devise or legacy may upon such predecease vest in some other beneficiary, and local statutes are found in aid of such presumptions. *Glover v. Condell*, 163 Ill. 566, 35 L. R. A. 360, 45 N. E. 173; *Farnsworth v. Whiting*, 66 A. 831, 102 Me. 296; 65 A. 282, 27 R. I. 586; 81 N. E. 640, 76 Ohio St. 443. As to a lapse in gifts to a class, see (1893) 1 Ch. 567.

<sup>2</sup> 1 My. & K. 589; *Hubbard v. Alexander*, 3 Ch. Div. 738; Wms. Exrs. 1290-1294; 10 Johns. 156, 6 Am. Dec. 326; *Rice v. Boston Aid Society*, 66 N. H. 191; *Suisse v. Lowther*, 2 Hare, 424, 432, *per* Wigram, V. C. For recent instances of legacies held to be cumulative and not merely repetitive or substitutionary, see *Uteley v. Titcomb*, 63 N. H. 129; *Barnes v. Hanks*, 55 Vt. 317; *Sponsler's Appeal*, 107 Penn. St. 95. Legacies, not of the same kind, or not payable in the same event, or at the same time, may well be presumed cumulative. *Wray v. Field*, 2 Russ. 257. But where legacies are of the same amount and character, the presumption that they were intended to be cumulative is a slight one, and may be easily shaken. 17 Ves. 34, 41; Wms. Exrs. 1291, and numerous cases cited. See also *State v. Crossley*, 69 Ind. 203; Book I. 565, *supra*. And see as to incidents, *Cooper v. Day*, 3 Meriv. 154; Wms. Exrs. 1296; 7 Sim. 237; 27 Beav. 386.

<sup>3</sup> 12 Wend. 68; *Sheldon v. Sheldon*, 133 N. Y. 1, 30 N. E. 730. And see *Horlock, Re.* (1895) 1 Ch. 516. But identity in amount may be evidence of such intent. 55 N. J. Eq. 42, 35 A. 827. See as to former rule presuming an intended satisfaction, Wms. Exrs. 1297, 1298, and cases cited. Express statement in the will of course governs. *Rusling v. Rusling*, 42 N. J. Eq. 594, 8 A. 534. See 70 Iowa, 368, 30 N. W. 638; 51 Conn. 153.

470. Where a creditor bequeaths a legacy to his debtor, without clearly indicating his intention in so doing, the presumption appears to be that the debt shall not thereby be released or extinguished; and if the debt be further evidenced by a promissory note or other writing, and the writing, documents, or securities, appear among the testator's effects, uncanceled, and as though fit to be treated as assets, they will be so regarded.<sup>1</sup> To bequeath expressly the debt to one's debtor operates as a sort of testamentary release to him; but, inasmuch as a testament cannot dispose of assets, nor give legacies to the injury of creditors against the estate, the debt must needs continue assets for their benefit, should a deficiency appear.<sup>2</sup>

471. The *ademption of a legacy* signifies its revocation, aside from a revocation of the will itself. By the word "ademption," employing its Latin figure, is signified the extinction or taking away of a legacy in consequence of some act of the testator which, though not directly a revocation of the bequest, should be considered in law as tantamount thereto.<sup>3</sup>

472. Trustees are designated under a will to hold and manage some special fund, apart from executors. These trustees act subject to the approval, direction, and sometimes selection of courts of equity; and, properly speaking, the administration of these testamentary trusts is a branch, and quite an important one, of equity jurisdiction. In many parts of the United States, however, the local probate courts have general equity powers,

As for satisfying portions by a legacy, a rule of presumption is applied by the equity decisions; though here, once more, the question is mainly one of the presumed intention of the testator.

<sup>1</sup> Wms. Exrs. 1303; *Wilmot v. Woodhouse*, 4 Bro. C. C. 226. Under such circumstances, it is held that the legacy of a creditor to his debtor may be retained in payment *pro tanto*, though the debt were barred by the statute of limitations. *Coates v. Coates*, 33 Beav. 249; 3 Hare, 589; Wms. Exrs. 1304; *Brokaw v. Hudson*, 27 N. J. Eq. 135. But cf. *Allen v. Edwards*, 136 Mass. 138. Local statutes sometimes provide that a debt due from a legatee to the estate may be deducted from his legacy. Where, however, the evidence goes to show that the creditor meant to release the debt and give a legacy besides, his debtor shall have the full benefit thereof. *Wilmot v. Woodhouse*, 4 Bro. C. C. 226; *Hyde v. Neate*, 15 Sim. 554; Wms. Exrs. 1304; *Eden v. Smyth*, 5 Ves. 341. Cf. Wms. Exrs. 1304. It must be conceded that a transaction, as between debtor and creditor, may lie entirely outside the will, notwithstanding debtor or creditor be himself a legatee; nor is it strange for a testator to so regard it. A liberal construction is given to the intention of a testator to forgive a debt. See 37 N. J. Eq. 377; 76 Ala. 381; *Bromley v. Atwood*, 96 S. W. 356, 79 Ark. 357.

<sup>2</sup> *Rider v. Wager*, 2 P. Wms. 331; *Herrick v. Wright*, 63 N. H. 274 (debtor's note). As to the effect of appointing a debtor to be one's executor, see *supra*, 208.

<sup>3</sup> 1 Jarm. Wills, 147; Wms. Exrs. 1321; *supra*, Book I, Part IV. The *ademption of a legacy* is distinguishable, of course, from its lapse. *Supra*, 467. And see 117 N. W. 260, 139 Iowa, 219.

conferred by statute, and exercised concurrently with the supreme tribunal of the State; and they appoint, qualify and supervise such trustees in the first instance, as in case of executors.<sup>1</sup>

473. **The proper construction of a will, and the true interpretation of an executor's or trustee's duties in conformity thereto, raise other issues which pertain more strictly to an equity jurisdiction, where the course to be pursued is left uncertain. The convenient method is to bring a bill of equity in the nature of a bill of interpleader, to procure instructions how to act; thus saving to the fiduciary, executor or trustee, the hazards of later litigation, and avoiding on his own part a perilous risk. Whenever there is reasonable doubt in regard to the proper construction of an instrument creating a testamentary trust, the rule is, that chancery or, under statute, a probate court may be resorted to for instructions.**<sup>2</sup>

<sup>1</sup> See local codes; *supra*, Book I, 608-611. The duties of testamentary trustee are distinct from those of executor, and require separate credentials of letters issued upon qualifying by bond, even though, as often happens, the testator has designated the same person to serve in both capacities. Where a vacancy from some cause occurs in the office, as where the trustee named declines, resigns, dies, or is removed before the objects thereof are accomplished, the probate court, upon the usual formalities, makes an appointment for one to act alone or jointly with others, as the case may be. Co-trusteeship survives like co-executorship. Like an executor, the testamentary trustee is required to return an inventory and render his account regularly to the probate court; and, for misconduct or culpable negligence, he is liable to removal, his bond to the judge being put in suit for the benefit of those injured by his breach of trust. Subject to the usual variation of State enactments, the general rule, in the United States, is to place testamentary trustees under a probate supervision similar, *mutatis mutandis*, to that of executors, and from a like sedulous regard for the welfare of the beneficiaries. From the probate decree in such trusts, the usual appeal lies to the supreme tribunal of the State. Smith Prob. Law, 93, 97, 101, 236; Redf. Surr Pract. 424. The local code and practice should be consulted.

<sup>2</sup> *Supra*, 265; Book I, 492.

As between the executors and trustees under a will, it would seem a rational distinction, that, when the doubtful interpretation relates simply to administering a fund or funds turned over to the trustees for purposes prescribed by the testator, the trustees are the proper persons to procure instructions; but, that where such doubt relates substantially and radically to the administration of the estate, as in determining how the executor shall perform his own duties, so as to discharge himself of legacies and the residue for whose satisfaction he is officially responsible, he rather should be the petitioner. While, however, executors or trustees, as the case may be, take more commonly the initiative, and bring a bill setting forth the facts, and calling upon the claimants to settle their rights before the court, the procedure is not left wholly to their option; but any party, claiming an interest affecting the construction of the will, legatee or *cestui que trust*, may institute the suit against the executor or trustee and all other parties interested in the question. *Martineau v. Rogers*, 8 De G. M. & G. 328; *Maxwell v. Maxwell*, L. R. 4 H. L. 521; *Bowers v. Smith*, 10 Paige, 193; *Treadwell v. Cordis*, 5 Gray, 341; 2 Story Eq. Jur. 824, and cases cited. And see as to one who is both executor and trustee, *Putnam v. Collamore*, 109 Mass. 509. See also *Clay v. Gurley*, 62 Ala. 14.

Where directions are thus sought in regard to the interpretation of a will or trust, and the duty of those appointed to carry its provisions into effect, the whole expense of the litigation is generally thrown upon the estate, unless the petitioner discloses a frivolous case. 3 P. Wms. 303; 20 Pick. 378; *Rogers v. Ross*, 4 Johns. Ch. 608;

474. The familiar rule of testamentary construction is that the testator's intent shall, if possible, prevail.<sup>1</sup>

475. All the parties interested in an estate or fund, may, by their own mutual agreement, if competent and *sui juris*, waive stipulations under the will which affect its distribution, or agree upon some particular construction of doubtful provisions, so that the will shall be carried out accordingly. An executor, by procuring some such mutual agreement, may often relieve himself of an embarrassing responsibility without invoking the assistance of the court at all.<sup>2</sup>

Howland v. Green, 108 Mass. 283. English practice is to pay the fund into court, and have the parties appear and obtain the judgment of the courts as to their rights. Hooper's Will, *Re*, 7 Jur. N. S. 595. Chancery seeks, if it be practicable, to adjust the costs ratably to the various interests affected by the construction. See L. R. 7 Eq. 414. This may prove an especial hardship to residuary legatees; and no precaution is so good as that of making one's own testamentary scheme clear, simple, and just.

<sup>1</sup> See Book I, Part IV, *passim*. Uniform justice here is better than strict consistency; and it is observable, that, while in contracts the common mind of two or more must be sought out from their mutual expression, a will expresses but one mind essentially, and one disposition; and again, that, as *inter vivos*, parties may oppose their own proofs, whereas the testator necessarily confides his meaning to an instrument which courts of equity are sacredly enjoined to interpret justly as between him and those he leaves behind, should controversy arise, death having closed his own lips.

<sup>2</sup> Legislation sometimes extends expressly the right of thus adjusting conflicting interests, by empowering the executor or other fiduciary to bind the future contingent interests of parties not capable of being represented, wherever the court of equity shall declare the operation of such proceeding to be just and reasonable in its effect upon such interests. Brophy v. Bellamy, L. R. 8 Ch. 798.



## CHAPTER IV.

## PAYMENT AND SATISFACTION OF LEGACIES.

476. In the payment of legacies all valid legal claims, it should be observed, take precedence, regardless of a testator's wishes.<sup>1</sup> For a strict legacy is merely a gift. An executor's disregard of such legal preference renders him liable personally.<sup>2</sup>

477. The premature payment of a legacy is validated, so far as all claim by the legatee is concerned, by the probate and appointment.<sup>3</sup> For the executor's protection in this or other cases of official liability, a refunding bond from the payee is proper. And it is quite common for American codes to provide with reference to probate practice, that such bond shall be given by a legatee where payment is made prematurely.<sup>4</sup>

<sup>1</sup> *Lomas v. Wright*, 2 My. & K. 769; *Spode v. Smith*, 3 Russ. 511; *Wms. Exrs.* 1340, 1341. Even voluntary bonds under seal. *Gordon v. Small*, 53 Md. 550; *Krell v. Codman*, 154 Mass. 454, 26 Am. St. Rep. 260, 14 L. R. A. 860, 23 N. E. 578. See *Pitkin v. Peet*, 108 Iowa, 480, 79 N. W. 272 (precedence of widow's annuity under an antenuptial settlement).

<sup>2</sup> Even though he follows the directions of the will. *Handley v. Heflin*, 84 Ala. 600, 4 So. 725.

Much discussion has arisen upon the liability of a representative for contingent claims, as upon some outstanding covenant in a deed, or condition in a bond, executed by his testator, where the condition or covenant is not yet broken; and the result appears to be, that the executor is not obliged to part with the assets to particular or residuary legatees, unless fully indemnified against such contingent claims. *Cro. Eliz.* 466; *Moore*, 413; *Aleyn*, 38; *Hawkins v. Day*, *Ambl.* 160; *Cochrane v. Robinson*, 11 Sim. 378; *Wms. Exrs.* 1341-1344. And while an executor may be bound to pay over to the legatee upon receiving such indemnity, the decisions establish that, without such indemnity or impounding part of the assets, he would be liable to answer in damages *de bonis propriis*, should the covenant or condition be afterwards broken so as to become absolute. 4 *Hagg.* 244; 11 Sim. 378; *Wms. Exrs.* 1344; 3 *Meriv.* 547. Chancery, however, will protect an executor who confides in its guidance. 20 *Beav.* 1; *England v. Tredegar*, L. R. 1 Eq. 544. And the modern chancery practice is to permit creditors to follow assets into the hands of legatees. 1 *Atk.* 491; *Wms. Exrs.* 1348; 3 *My. & Cr.* 42. A kindred inquiry relates to the payment of legacies before claims, of which an executor had as yet received no notice, were settled. See *Wms. Exrs.* 1349-1353; 1 *Esp.* 275; 1 *Beav.* 540; *Norman v. Baldry*, 6 Sim. 621; *Smith v. Day*, 2 *M. & W.* 684.

Modern American legislation, as elsewhere noticed, removes most practical difficulties, by setting a reasonable barrier to the presentment of claims against an estate, and providing for impounding assets, under the probate direction, to meet inchoate or contingent claims. *Supra*, 418-420. And see the English statute 22 & 23 *Vict. c.* 35, § 39, to much the same purport. *Wms. Exrs.* 1355; L. R. 3 *Eq.* 368.

<sup>3</sup> *Pinkham v. Grant*, 72 Me. 158; 238.

<sup>4</sup> See local code. And see *Chandler v. Batchelder*, 61 N. H. 370; *Martin v. Lapham*, 38 Ohio St. 538. So, too, as to a distributee, under like circumstances, where there is no will. But such security should not be required where payment is made in due course and without risk.

478. Legacies are usually payable, unless the will fixes a later date, at the expiration of one year from the testator's death; the presumption being, that such delay allows the executor reasonable time for informing himself whether the estate is ample to pay both debts and legacies.<sup>1</sup> But, as this rule is set for the convenience of an estate, executors may of choice, and in fact often do, pay legacies much earlier where the estate is undoubtedly ample or a refunding bond is given.<sup>2</sup> If the payment of a legacy is postponed by an intervening estate, by pending litigation, or for any other cause, more than a year after the testator's death, it becomes payable immediately when the right accrues, and the executor cannot claim further delay.<sup>3</sup> A legacy, given under a will in the form of an annuity, or as regular income for life, follows the general rule as to the time when the executor must begin paying it; that is to say, the first payment need not be made by him until a year has elapsed from the testator's death; but the date from which the annuity or income shall actually commence, and the frequency of the periodical payments, must be gathered from the expressions of the will and the testator's obvious intent.<sup>4</sup>

<sup>1</sup> *Wood v. Penoyre*, 13 Ves. 333; *Miller v. Congdon*, 14 Gray, 114; 11 Phila. (Pa.) 26; *Wms. Exrs.* 1387; *State v. Crossley*, 69 Ind. 203. Within the first year, therefore, an executor cannot be compelled to pay over legacies, notwithstanding the will itself directs their earlier discharge, unless, as some local statutes provide, one's directions to that effect must be followed. *Wms. Exrs.* 1387; *Benson v. Maude*, 6 Madd. 15; *White v. Donnell*, 3 Md. Ch. 526. There is no estate applicable to the payment of legacies until the testator's debts are paid or provided for. *Coddington v. Bispham*, 36 N. J. Eq. 224; *Foltz v. Hart*, 84 Ind. 56; 476.

<sup>2</sup> 1 Sch. & Lef. 12; *Garthshore v. Chalie*, 10 Ves. 13.

<sup>3</sup> 2 P. *Wms.* 478; *Miller v. Philip*, 5 Paige, 573; *Lord v. Lord*, L. R. 2 Ch. 782.

Where the legacy is liable to be devested by a condition subsequent or limitation over upon some contingency, the legatee shall nevertheless receive his legacy at the end of a year from the testator's death; and, whether security shall be required of such legatee to refund in case his title be devested, depends upon circumstances; though equity dispenses with such security, unless prudence evidently requires it to be taken. *Fawkes v. Gray*, 18 Ves. 131; *Taggard v. Piper*, 118 Mass. 315; *Wms. Exrs.* 1388. See cost of security deducted from legacy in 6 Madd. 89.

Executors are permitted to lend to a devisee or legatee, in a proper case, upon the security of his interest. 2 Dem. 435. An advance to a legatee in necessitous circumstances is sometimes ordered. 1 Dem. 553; 65 Cal. 378, 4 P. 379.

<sup>4</sup> *Wms. Exrs.* 1390; *Irvin v. Ironmonger*, 2 Russ. & My. 531; *Storer v. Prestage*, 3 Madd. 167. And see *Wiggin v. Swett*, 6 Met. 194, 39 Am. Dec. 716; 163 Ill. 502, 45 N. E. 417 (investment of fund for annuity purposes). An annuity under a will is a legacy. 61 Miss. 372. Statutes sometimes provide for compelling an executor after a summary manner in probate court to pay a legacy. 2 Dem. 134, 230. But this jurisdiction exists only where the right to the legacy is undisputed; and if the rights of others to the legacy are in controversy, these rights can only be determined upon a final accounting. *Riggs v. Cragg*, 89 N. Y. 479; 92 N. Y. 251. As to lien of a legacy upon the land on which it is charged, see *Lombaert's Appeal*, 99 Penn. St. 580; *Merritt v. Bucknam*, 78 Me. 504, 7 A. 383.

Where the executor is directed by the will to invest a legacy and pay the income to another for his life, it is a breach of his official bond if he does not so invest, but uses the legacy in his business. *Scituate Court v. Angell*, 14 R. I. 495.

479. Notwithstanding a year's possible delay in paying over the legacy, a legatee is entitled to payment and his right becomes fixed, unless the will speaks differently, as of the date when the testator died.<sup>1</sup> It is the executor's duty to promptly notify legatees of their legacies, and if from any ambiguity it is uncertain who are legatees, to institute a bill for ascertaining.<sup>2</sup>

480. A specific legacy shall go to the legatee, with whatever interest, income, or produce may have accrued thereon since the testator's death besides.<sup>3</sup> Prudence dictates, therefore, that the executor should discharge himself of specific legacies as soon as he is satisfied that he may safely do so, considering the debts; for, while he retains the specific thing or fund with its accretions, he must account as for the management of something distinct from the testator's general estate.<sup>4</sup>

<sup>1</sup> 10 Ves. 1, 13; *supra*, 467; *Carter v. Whitcomb*, 69 A. 779, 74 N. H. 482.

<sup>2</sup> *Tilton v. American Bible Society*, 60 N. H. 377, 49 Am. Rep. 321. Cf. 487. Doubts may arise in case of a legacy by way of annuity; for the testator might have intended it to commence from the end of the first year, instead of what is more rational, from the date of his own death. See 7 Ves. 96, 97; *Wms. Exrs.* 1390; *Kent v. Dunham*, 106 Mass. 586. There has been great fluctuation of opinion in the equity courts, moreover, concerning the effect of a bequest of use, income, or interest in property, to a person for life, and then the principal over to others; but it is finally well established, that the beneficiary for life shall be entitled to the income in one shape or another from the death of the testator; and this, notwithstanding the life income is to be derived from a residuary fund which might not be ascertainable until much later. *Wms. Exrs.* 1390, 1391; *Brown v. Gellatly*, L. R. 2 Ch. 751; 1 Hare, 161. And see *Sargent v. Sargent*, 103 Mass. 297; *Evans v. Inglehart*, 6 Gill & J. 171; 9 Cush. 151; *Williamson v. Williamson*, 6 Paige, 298; *Hilyard's Estate*, 5 Watts & S. 30; 42 Barb. 533. But see *Welsh v. Brown*, 43 N. J. L. 37. Local American statutes expressly favor such construction as to all annuitants and income beneficiaries, whether for life or until the happening of some event. See e.g., Mass. Gen. Stats. c. 97, §§ 23, 24.

Where on the death of the life tenant who received the fixed interest of an invested fund of securities under a will, these securities sold for more than the original investment, it was held that this surplus belonged to the remaindermen. *Gerry, Re*, 103 N. Y. 445. A dividend being declared but not payable on stock before the life beneficiary died is principal and not income; so are interest in a sinking fund, and options; but a dividend declared after the death of the life beneficiary from earnings accumulated previously is income. *Kernochan, Re*, 104 N. Y. 618. See further, *supra*, 324. A life beneficiary ought to keep down charges on the several parts of his fund out of the income of the whole. (1896) 2 Ch. 511.

<sup>3</sup> Thus, a specific legacy of domestic animals carries subsequent offspring of the females and all profitable usufruct; a specific legacy of stock, the dividends since accruing; and a specific legacy of notes, bonds, or other incorporeal personalty, the interest and coupons, if any, appropriate thereto from a similar date; in short, whatever the specific thing or fund has legitimately earned from the time the legatee's right became vested. *Wms. Exrs.* 1424, 1438; 2 Ves. Sen. 560; *Barrington v. Tristram*, 6 Ves. 345; *Evans v. Inglehart*, 6 Gill & J. 171; *Kay*, 600. Thus, too, would it be, with specific funds appointed to specific purposes, under a will's apparent intent. *Loring v. Horticultural Society*, 171 Mass. 401, 50 N. E. 936.

<sup>4</sup> In exceptional cases the specific bequest of an incorporeal chose is found, by due intent of the will, to carry even interest accruing in the lifetime of the testator, as e.g., from the time the will was executed. *Harcourt v. Morgan*, 2 Keen, 574.

481. But as to interest on general legacies, the rule is somewhat different. Prudence in the settlement of the estate is here, too, requisite; but the year's delay allowed the executor operates to postpone interest on the several demands of legatees. Interest is recoverable, in general, from the time such a legacy becomes payable, and not sooner; which means, usually, after the expiration of the year from the testator's death.<sup>1</sup> After the expiration of the year, interest is generally allowed to pecuniary legatees from whom payment is withheld; and especially does this hold true where it appears that the executor has all the time had the means in his hands wherewith to pay the legacy.<sup>2</sup> And interest will run in the legatee's favor thenceforth, even though no demand has been made upon the executor for the legacy.<sup>3</sup>

482. To this rule for delaying a reckoning of interest, well-settled exceptions exist in favor of young offspring not otherwise

<sup>1</sup> *Wood v. Penoyre*, 13 Ves. 326; 1 Md. Dec. 151; *Miller v. Congdon*, 14 Gray, 114; 11 Phila. (Pa.) 26; *State v. Crossley*, 69 Ind. 203; *Wms. Exrs.* 1424; 41 N. J. Eq. 39, 2 A. 778; *Springer's Appeal*, 111 Penn. St. 228, 2 A. 855; 22 S. C. 92. And see *Davenport v. Sargent*, 63 N. H. 538. Even though the testator directed payment of the legacy "as soon as possible," or "with interest," this does not change the rule; nor are phrases in the will readily construed as justifying later payments without allowance of interest. *Webster v. Hale*, 8 Ves. 410; 4 Bradf. (N. Y.) Sur. 364; *Bartlett v. Slater*, 53 Conn. 102; *Kent v. Dunham*, 106 Mass. 586. And even though the fund out of which payment of a pecuniary legacy is directed should bear interest meantime, residuary legatees are presumed entitled to the benefit. *Pearson v. Pearson*, 1 Sch. & Lef. 10. But, if the will clearly directs the payment of interest from an earlier date, the bequest is enlarged accordingly. 171 Mass. 401, 404. And where the legacy is decreed to be in satisfaction of a debt, and hence not a mere gift, the equity practice is to allow interest from the death of the testator. 16 Ves. 393; *Clark v. Sewell*, 3 Atk. 96; *Way v. Priest*, 87 Mo. 180. Where, moreover, the executor voluntarily pays the legacy over within the year, or invests it specifically for the legatee's benefit, or pays it into court and the court orders the money specially invested, the interest, profits, and income thereafter accruing will belong to such legatee. *Maxwell v. Wettenthal*, 2 P. Wms. 27; *Wms. Exrs.* 1424, 1427; 1 Sumner, 1.

<sup>2</sup> 13 Ves. 326, and other cases cited *supra*.

<sup>3</sup> *Wms. Exrs.* 1427; *Birdsall v. Hewlett*, 1 Paige, 32. See *State v. Adams*, 71 Mo. 620 (delinquency excusable). The general rule is to admit of no excuses for failure to pay such interest if ever the estate can afford it. 106 Mass. 586; 6 Dana, 361; 7 Gratt. 377; 25 N. J. Eq. 202; *Wms. Exrs.* 1427; 1 Sch. & Lef. 10. If the executor has sufficient assets, he must pay interest to legatees from the end of the twelve months whether the assets have been productive or not, all intermediate profit, if received, going to swell the general bulk of the estate. 70 Iowa, 368, 30 N. W. 638; *Pearson v. Pearson*, 1 Sch. & Lef. 10. For the rule as to compounding interest in case of inexcusable delay, see *Wms. Exrs.* 1433; 2 P. Wms. 26; 106 Mass. 586; *post*, Part VII.

Those entitled to income or annuity are usually entitled to regular payments after the first instalment, reckoning back, but not to interest upon income thus regularly paid. See *Wms. Exrs.* 1428; 8 Hare, 120.

The English chancery rule computes the usual rate of interest payable on a legacy at four per cent. *Wms. Exrs.* 1432, 1433. In the United States the rate fixed may be greater. 27 N. J. Eq. 492. But the statute rate determines, even though trust funds usually earn a lower rate. *Welch v. Adams*, 152 Mass. 74, 9 L. R. A. 244, 25 N. E. 34; 171 Mass. 404, 68 Am. St. Rep. 440, 50 N. E. 933, 41 L. R. A. 800.

provided for;<sup>1</sup> or so as to give corresponding support to a widow, or where in consideration of her release of dower;<sup>2</sup> or so as to pursue special directions of the testator.<sup>3</sup>

483. The executor is bound to pay each legacy to the person entitled to receive it, or to his proper legal representative. If the legatee has deceased since the testator, his executor or administrator is the proper representative; and an appointment may be needed accordingly for the express purpose of discharging such payment.<sup>4</sup>

484. Aside from legislation expressly providing for the case of absentees, the executor may find himself embarrassed with respect to legacies which are nominally payable to persons who, in fact, have long been absent and missing, and cannot with certainty be pronounced alive or dead. Probate courts have no inherent jurisdiction of questions pertaining to the payment of legacies. The executor's better course, when left with legacies in his hands awaiting unknown claimants, appears to be, in the absence of positive statute direction, to trust himself to the guidance of chancery, investing or disbursing the fund as that court may require.<sup>5</sup>

<sup>1</sup> *Harvey v. Harvey*, 2 P. Wms. 21; 3 Russ. 263; *Martin v. Martin*, L. R. 1 Eq. 369; *Williamson v. Williamson*, 6 Paige, 298; Wms. Exrs. 1429; 4 Rawle, 113. Even though the will should expressly direct an accumulation of the income. *Mole v. Mole*, 1 Dick. 310.

<sup>2</sup> *Ib.* And see 1 Beav. 271; *Williamson v. Williamson*, 6 Paige, 298. But see 2 Penn. St. 221. A legacy payable at a future fixed date, or on a future contingency, carries no interest in such legatee's favor, as a rule, until the date arrives or the contingency happens. Wms. Exrs. 1428.

<sup>3</sup> *Knight v. Knight*, 2 Sim. & Stu. 792; 2 Wms. Exrs. 1430-1433. Compound interest on the legacy will, if directed, be allowed the legatee. *Arnold v. Arnold*, 1 My. & K. 365; *Treves v. Townshend*, 1 Bro. C. C. 386; 15 Beav. 461. Fund given in trust to support. *Townsend's Appeal*, 106 Penn. St. 268.

<sup>4</sup> We have seen that if the legatee dies before the testator, the legacy usually lapses. *Supra*, 467. Where the legatee is an infant, the parent or natural guardian of the child should not be paid, nor the child himself, but the child's probate or chancery guardian duly appointed and qualified. Schoul. Dom. Rel. 3d ed. § 302; *Dagley v. Tolferry*, 1 P. Wms. 285; 3 Pick. 213; 1 Johns. Ch. 3; *Quinn v. Moss*, 12 Sm. & M. 365; 1 Dem. 180; 94 Ga. 270. Letters of probate guardianship often issue in American practice because some legacy or distributive share vests. But English chancery guardianship is so costly that the statute sometimes provides otherwise. See Wms. Exrs. 1406-1408; 31 Beav. 48. Where, too, the legatee is insane, the qualified guardian or committee of such insane person is, in American probate practice, the proper person to receive the legacy. Schoul. Dom. Rel. 3d ed. § 293. As to married women, the common-law rule has now so completely changed, that, in general, only the wife herself can receipt for her separate legacy, and it cannot be paid to her husband. *Ib.*; Part II, *passim*. An equal distribution among all of a class should be made where the will so designates. *Rollins v. Rice*, 59 N. H. 493. See also as to direction of the will as to payment, *Denton, Re*, 102 N. Y. 200, 6 N. E. 299.

<sup>5</sup> English legislation is found for such cases. Wms. Exrs. 1407; *Birkett, Re*, L. R. 9 Ch. D. 576. American statutes, somewhat corresponding in tenor, may be found; but our legislation is usually with reference rather to unclaimed balances in an administrator's hands. See next chapter. Where a legatee has been long absent, sixteen

485. If the bequest be to one person for the benefit of others, or with directions to expend the fund for the use of others, either generally, or in a particular mode, the executor may safely make payment to such person, as trustee, without reference to the parties beneficially interested.<sup>1</sup> It is customary, however, in modern wills for the testator to name trustees who shall hold funds bequeathed for the benefit of others, or for special purposes, such as charity, and wherever a full legal title in the beneficiary is suspended.<sup>2</sup>

486. Specific things bequeathed should be identified and delivered to the respective legatees, as directed by the will.<sup>3</sup> The direction of the will as to such legacies should be followed.

years or more, without being heard from, chancery has presumed death, in various instances; directing, it may be, that those entitled in such contingency to the legacy, should, upon its receipt, furnish security to refund in case the legatee should ever return. *Dixon v. Dixon*, 3 Bro. C. C. 510; *Bailey v. Hammond*, 7 Ves. 590; *Wms. Exrs.* 1420. See *Lewes' Trusts*, *Re*, L. R. 11 Eq. 236.

<sup>1</sup> *Cooper v. Thornton*, 3 Bro. C. C. 96; *Robinson v. Tickell*, 8 Ves. 142.

<sup>2</sup> 472, *supra*. Testamentary trustees, in American practice, must qualify and receive letters from the probate court before they are empowered to act; nor should an executor place the trust fund in their hands until they have conformed to statute. *Newcomb v. Williams*, 9 Met. 535. Even though the same person be constituted executor and trustee under the will, he must procure his credentials as trustee in due form, as preliminary to holding and managing the fund in his new capacity. *Miller v. Congdon*, 14 Gray, 114. So, too, he must show some act done to change the character of his holding and to place the fund properly, before he can be discharged as executor therefor. *Sanborn's Estate*, 109 Mich. 191. Where the testator omits to name a trustee, or the trustee named is disqualified, or declines to act, or a vacancy afterwards occurs from any cause, proceedings may usually be had, in American practice, for filling the office by probate appointment. See local statutes as to appointing testamentary trustees; *Lord Alvanley in Cooper v. Thornton*, 3 Bro. C. C. 96. And see *Wheatley v. Badger*, 7 Penn. St. 459; *supra*, 247, 472. But where personal property is given in trust, the executor should protect and preserve the property until a trustee has been appointed. *Casperon v. Dunn*, 42 N. J. Eq. 87 (delay in appointment). And in special instances he may be compelled to act and account as trustee. *Hodge's Estate*, 63 Vt. 661, 22 A. 725; *Groton v. Ruggles*, 17 Me. 137. And see *Carson v. Carson*, 6 Allen, 209; 14 Gray, 114. However unusual in extent and character may be the functions thus exercised by him, the executor is bound to a just and rightful performance; and his official bond, though expressed after the ordinary tenor, stands as security that the obligations he has incurred shall be faithfully performed in all respects. *Wms. Exrs.* 1399; *Dorr v. Wainwright*, 13 Pick. 328; *Sheet's Estate*, 52 Penn. St. 257; 45 Barb. 182.

<sup>3</sup> Where the testator bequeaths a number of things, out of a larger number belonging to him,—as in a bequest of “ten of the horses in my stable,”—it is held that the legatee has a right of selection from the number. *Jacques v. Chambers*, 2 Col. 435; *Wms. Exrs.* 1440. But where the entire fund is bestowed in parcels, to be divided among different legatees, such individual selection would be impracticable. See *Stapleton v. Haight*, 113 N. W. 351, 135 Iowa, 564; *Low v. Low*, 77 Me. 171.

Where the executor delivers a specific legacy or a specific fund to the life beneficiary and takes a proper receipt or inventory for the remainder-man, the legacy or fund having been thus bequeathed, he is discharged from further duty or liability. 52 N. J. Eq. 611, 30 A. 477.

487. The presumption is that lawful money shall be used in paying general legacies.<sup>1</sup> But a testator may require any such legacy to be paid in a particular currency or coin, or in specified securities or property.<sup>2</sup> In either case an executor does not discharge himself when he turns over worthless or desperate securities by imposing on the young or inexperienced.<sup>3</sup> Legacies not residuary are payable without deduction for expense of administration, although paid out of real estate upon which they are charged.<sup>4</sup> But a legacy tax may be payable under local statute.<sup>5</sup>

488. The assent of the executor to a legacy is requisite, by the theory of our law, to make the title of a legatee, whether specific or general, complete and perfect.<sup>6</sup> But, as an executor's wishes are not to control those of his testator, the object of the requirement appears to be nothing more than to await the executor's reasonable convenience. Consequently, a legatee has no right to take possession of his legacy and exercise full dominion over it, pending administration; nor could the testator himself have conferred such a privilege without imperilling prior rights.<sup>7</sup> Should, however, the executor unreasonably withhold his assent to the

<sup>1</sup> Rates of exchange in payments will be reckoned accordingly. *Wms. Exrs.* 1433-1435; *Lansdowne v. Lansdowne*, 2 Bligh, 91; *Bowditch v. Soltyk*, 99 Mass. 136; *Yates v. Maddan*, 16 Sim. 613. As to payment in "confederate money," see 79 Va. 118.

<sup>2</sup> *Sheffield v. Lord Coventry*, 2 Russ. & My. 317; 1 Russ. & My. 216; *King v. Talbot*, 50 Barb. 453.

An executor is not bound to search out a legatee; it is enough if he is always ready when called upon to pay the legacy. *Thompson v. Youngblood*, 1 Bay (S. C.) 248; *Hemphill v. Moody*, 62 Ala. 510. Yet, as the executor must be ready to pay interest on the legacy after one year, he should invest the amount or else pay it into court to be invested. *Lyon v. Magagnos*, 7 Gratt. 377. And see 60 N. H. 377. A legatee or distributee may, if *sui juris*, receipt and release for what is due him. Taking the fiduciary's own note for the amount is a postponement. *Lawton v. Fish*, 51 Ga. 647; 9 N. J. Eq. 314. As to form of decree for distribution of a legacy where there is a doubt concerning the person entitled, see 3 Dem. 282.

<sup>3</sup> 1 Dem. 568. See also *Coddington v. Stone*, 36 N. J. Eq. 361; 101 N. Y. 311. Debt lies to recover a legacy on a decree of the probate court in our local practice. *Weeks v. Sowles*, 58 Vt. 696. Or equity may be resorted to, regardless of proceedings upon the executor's bond. *Matthews v. Targarona*, 65 A. 60, 104 Md. 442.

<sup>4</sup> *Hays's Estate*, 153 Penn. St. 328.

<sup>5</sup> Whether legacies are liable to legacy duty, etc., or not is a familiar subject in English practice. (1894) 1 Ch. 286. And in this country at the present time (1910), we find legacy and succession taxes imposed by State if not by Federal legislation.

That legacies may by mutual agreement be settled by appropriating specific assets of the estate as equivalent for cash, see *Dowsett v. Culver*, (1892) 1 Ch. 210; 506, *post*.

<sup>6</sup> *Wms. Exrs.* 1372; *Northey v. Northey*, 2 Atk. 77; 2 Strobh. 101; *Refeld v. Belette*, 14 Ark. 148; *Lott v. Meacham*, 4 Fla. 144; *Crist v. Crist*, 1 Ind. 570; *Finch v. Rogers*, 11 Humph. 559; 57 S. E. 59, 127 Ga. 766.

<sup>7</sup> *Wms. Exrs.* 1372. Even though the legacy were of a specific chattel, trespass, trover, replevin, and other remedies founded in possessory rights, are inappropriate to the legatee's title before the executor has surrendered his own; nor should the legatee's sale and transfer give an indefeasible title to the purchaser. *Northey v. Northey*, 2 Atk. 77.

legacy, a court of equity will compel him to yield it.<sup>1</sup> Assent, moreover, may be express or implied, the question being one of fact.<sup>2</sup> A premature assent should not be readily inferred from doubtful acts or expressions.<sup>3</sup>

489. **The legatee's assent to the legacy** is another element in the acquisition of title thereto. A will being once established in probate, each legatee is readily presumed to assent to his own legacy, whether larger or smaller than what he might reasonably have expected. Yet the legatee's assent to his legacy is a legal prerequisite to the completion of the gift; for no one can be made the

<sup>1</sup> No action will lie at law to recover the legacy before assent is given; but equity regards the executor as a trustee, and compels him to assent where he ought to do so. 2 Md. Ch. 162; *Wms. Exrs.* 1375; 6 Dana, 148; 1 Hill Ch. 445; *Crist v. Crist*, 1 Ind. 579, 50 Am. Dec. 481.

<sup>2</sup> *George v. Goldsby*, 23 Ala. 326; *Refeld v. Belette*, 14 Ark. 148; 1 Ind. 570, 50 Am. Dec. 481; *Elliott v. Elliott*, 9 M. & W. 27; *Buffaloe v. Baugh*, 12 Ired. 201. If the executor notifies the legatee that he is ready to pay whenever the legatee calls, there is a clear assent. *Barnard v. Pumfrett*, 5 My. & Cr. 70. But not where he merely congratulates. *Wms. Exrs.* 1376. Nor should the assent of one who is named executor avail where another qualifies and administers. *White v. White*, 4 Dev. & Bat. 401.

<sup>3</sup> *George v. Goldsby*, 23 Ala. 326; 19 Ala. 666; *Wms. Exrs.* 1376; *Burkhead v. Colson*, 2 Dev. & Bat. Eq. 77; 112 Penn. St. 390, 4 A. 24. Cf. *Wms. Exrs.* 303, 1378. And see *Sherman v. Jerome*, 120 U. S. 319, 30 L. Ed. 680.

Should the legatee have or gain possession of the thing bequeathed, without the executor's assent, the executor, it would seem, may recover it from him by action at law, in trespass or trover, by virtue of his better title. *Wms. Exrs.* 1374; *Mead v. Orrery*, 3 Atk. 239. In general, the right to recover and collect assets is in the executor. And yet retention of the legacy for a considerable time, without complaint by the executor, may conclude the latter, if the thing or fund be not needed for administration, since assent may be given by acquiescence, and without an actual transfer of possession. *Andrews v. Hunneman*, 6 Pick. 126; *Spruil v. Spruil*, 2 Murph. 175; *Jordan v. Thornton*, 7 Ga. 517; *Eberstein v. Camp*, 37 Mich. 176. As to death of executor, pending administration, see *Cray v. Willis*, 2 P. *Wms.* 531. So may the executor's assent be given conditionally instead of absolutely. *Wms. Exrs.* 1378; *Lillard v. Reynolds*, 3 Ired. 366. In short, assent may be inferred either on the presumption that an executor meant to do what was his duty, or from some act or expression on his part which recognized the legatee's present right to receive the legacy. *George v. Goldsby*, 23 Ala. 326. Where there are joint executors, the assent of one will suffice. *Wms. Exrs.* 948, 1378; *Boone v. Dyke*, 3 T. B. Mon. 529. As to a presumed assent after lapse of time, etc., see 75 Ga. 285.

The effect of the executor's assent to a specific legacy is, that the thing bequeathed ceases at once to be part of the testator's assets, and the legal title of the legatee thereto becomes perfect; and this notwithstanding the assets prove afterwards insufficient to pay the debts. *Nancy v. Snell*, 6 Dana, 148. As to legacies not specific, the practical effect of the executor's mere assent appears of less consequence. There ensues a sort of contract obligation to pay the legacy, which obligation may be enforced in equity or perhaps in probate; but, unless a specific fund has been set aside in consequence, nothing can be identified upon which the legatee's legal title actually attaches. *Andrews v. Hunneman*, 6 Pick. 129; *Wms. Exrs.* 1372; *Dunham v. Elford*, 13 Rich. Eq. 190; 97 Ind. 289 (statute). Where the executor is himself a legatee, assent to his own legacy is needful, and meanwhile he holds the specified thing or fund in his representative capacity, even though all the debts have been paid. *Doe v. Sturges*, 7 Taunt. 223; *Wms. Exrs.* 1382. And see as to residuary legatee, *Ridgley v. People*, 163 Ill. 112, 45 N. E. 116. See further, *McKoy v. Guirkin*, 102 N. C. 21, 8 S. E. 776; *Murphee v. Singleton*, 37 Ala. 412. As to dispensing with assent, see 2 Sm. & M. 527, 41 Am. Dec. 607.



beneficiary of another against his own wish.<sup>1</sup> Should the legatee refuse to accept, and disclaim all title to the legacy, his refusal or relinquishment, given *sui juris*, would operate to divest his interest, and subject the property thus bequeathed to distribution as in the case of intestacy.<sup>2</sup> Furthermore, the beneficiary named in a will may sometimes be put to his legal election whether to take the benefit thereof or stand upon his own rights regardless of it.<sup>3</sup>

490. **The abatement of legacies in case of deficient assets** applies to general rather than specific legacies.<sup>4</sup> But it should be borne in mind that all legacies, specific or general, are postponed to the prior payment of all debts against the estate.<sup>5</sup>

490a. **The personal estate constitutes the primary fund for settling all personal obligations of a decedent; and next to debts and**

<sup>1</sup> Where a bequest is coupled with onerous conditions or trusts, as in various instances of charity, or some public corporation is legatee, a formal acceptance or assent will often precede with propriety the payment or delivery by the executor. The simple bequest to an individual, however, is usually assumed to have been accepted unless positively declined; and an actual acceptance, without reservation, of the money or specific thing bequeathed concludes the matter.

<sup>2</sup> *Walker v. Bradbury*, 15 Me. 207. In cumulative bequests to the same person, or a legacy with essential restrictions or conditions, there must be acceptance *in toto* or rejection *in toto* of what the testator has thus bequeathed. *Talbot v. Radnor*, 3 My. & K. 254. But the intention of the testator expressed in the will applies. *Long v. Kent*, 11 Jur. N. s. 824; *Wms. Exrs.* 1448.

<sup>3</sup> As to the election of a surviving spouse, see 457a. See also 79 N. E. 731, 186 N. Y. 456; 59 S. E. 299, 129 Ga. 512 (widow's allowance). In general one must elect to wholly abide by the will or wholly repudiate its benefits. *Van Schaack v. Leonard*, 164 Ill. 602; 103 N. Y. S. 446 (estoppel); *Hyatt v. Vanneck*, 82 Md. 465; 82 Wis. 364; 92 Va. 307; 148 N. Y. 410. But as to specific portions of a legacy to a town for different designated purposes, see *Webster v. Wiggins*, 19 R. I. 73. And see 106 N. Y. S. 27 (annuity).

<sup>4</sup> Specific legacies are not to be abated under ordinary circumstances, being answerable for debts only as a last resort, and for general legacies scarcely at all. *Wms. Exrs.* 1359, 1360. But the will may create special conditions. *White v. Green*, 1 Ired. Eq. 45; 25 N. Y. 128. Demonstrative legacies have a presumed security for their payment, and do not abate with general legacies. *Supra*, 461; 4 Ves. 150; *Creed v. Creed*, 11 Cl. & Fin. 509. As to legacies charged on land, see *McCorn v. McCorn*, 100 N. Y. 511; *Humphrey v. Hudnall*, 84 N. E. 203, 233 Ill. 185, 69 A. 655; 81 Vt. 121. So long as there remain assets, not specifically bequeathed, to appropriate to legal debts and charges against the estate, specific bequests cannot be disturbed, though general legacies be swallowed up; it is only when, the residuary and other general legacies sacrificed, nothing remains of the personal estate for satisfying legal debts and charges but what was specifically bequeathed, that specific and demonstrative legatees can be compelled to contribute; and, in such case, abatement shall be proportioned to the value of their respective legacies. *Barton v. Cooke*, 5 Ves. 461; *Wms. Exrs.* 1371.

<sup>5</sup> *Ford v. Westervelt*, 55 N. J. Eq. 585; 476. Where neither debts nor legacies are chargeable upon realty, the personalty must first be applied to paying the debts. *Ib.* See 509, etc. The doctrine of marshalling assets is specially considered in connection with the charge or exoneration of real estate; but as to personalty generally, regarded as assets for debts and legacies, and where the will has made no express directions to the contrary, a deficiency of assets is to be made up, by charging these classes in order: (1) Residuary legacies; (2) general legacies, with the exception of (3) legacies given for a valuable consideration; (4) specific and demonstrative legacies. We apprehend, however, that, as concerns a partial deficiency, this order may be varied considerably,

claims upon legal consideration, legacies should be thus satisfied; with such further resort to realty, in case of a deficiency of assets, as may be permissible.<sup>1</sup> But legacies are sometimes made expressly chargeable by one's will upon the real estate devised;<sup>2</sup> while an indiscriminate residuary bequest of realty and personalty charges the whole estate with the payment of other legacies.<sup>3</sup>

by explicit language in the will, giving precedence out of course. *Lewin v. Lewin*, 2 Ves. Sen. 415; 1 P. Wms. 668; 83 Md. 104, 34 A. 877; 115 N. C. 398, 20 S. E. 519; *Dey v. Dey*, 4 C. E. Green, 137; 5 Paige, 568.

General legacies rank together; so that whatever remains over and above satisfying the legal debts, demands, and charges against the estate and specific legacies, must be applied to general legacies in proportion to their amount, until they are fully paid. 78 Me. 233, 3 A. 733; *Mollan v. Griffith*, 3 Paige, 402. It follows, that where the estate is scarcely enough, or less than enough, to pay such general legatees in full, the residuary legatee must be the sufferer. See *Emery v. Batchelder*, 78 Me. 233, 3 A. 733; 84 N. E. 628, 234 Ill. 121; 1 Keen, 275; 3 De G. M. & G. 590; *Towle v. Swasey*, 106 Mass. 100. Local statutes, too, may be found to modify the rule. But legacies upon a meritorious consideration are preferred to other general legacies, because, doubtless, of their *quasi* obligatory character. 1 P. Wms. 127; *Ambl. 244*; 2 Ves. Sen. 420; *Norcott v. Gordon*, 14 Sim. 258; Wms. Exrs. 1364; *Wood v. Vandenburg*, 6 Paige, 277; *Clayton v. Akin*, 38 Ga. 300; *Pollard v. Pollard*, 1 Allen, 490. Cf. 432. But courts do not appear to apply this preference with a nice sense of justice; and, on the one hand, specific legacies will take full precedence, while, on the other, as among general legacies, these have been excepted to their full amount, even though the bequest should exceed the value of its actual consideration. *Towle v. Swasey*, 106 Mass. 106; *Ambl. 244*. Among general legacies thus privileged are those given in consideration of a debt actually owing to the legatee, or of the relinquishment of a widow's dower. Cases, *supra*; *Borden v. Jenks*, 140 Mass. 562, 54 Am. Rep. 507, 5 N. E. 623. It is essential, however, to this privilege that the consideration should subsist at the testator's death; and, hence, legacies given to creditors whose claims had been compounded and released during the life of the testator, or provisions nominally in lieu of dower, where the testator has left no dowerable lands, are voluntary merely. 2 P. Wms. 291; 5 Beav. 35; L. R. 3 Ch. D. 714. And the same may be said of a legacy given to pay off another person's debts. *Shirt v. Westby*, 16 Ves. 396. Aside from provisions which properly defray the incidental expenses of funeral and administration, legacies given for mourning rings, or to recompense executors for their care and trouble, are liable to abatement in the usual proportion. *Apreece v. Apreece*, 1 Ves. & B. 364, 2 Vern. 434; 16 Beav. 204; Wms. Exrs. 1366. In American States, however, where compensation is regularly allowed to executors for their services, a legacy given by way of recompense might, perhaps, be pronounced a legacy upon valid consideration, but, even were it abated, the executor would not be thereby debarred, we presume, from receiving his full compensation on the usual footing of such officials. See Part VII, c. 2, on this point. Legacies to servants, or for charities, cannot claim precedence. *Attorney-General v. Robins*, 2 P. Wms. 25; Wms. Exrs. 1366.

<sup>1</sup> See 5, 212-215, 509-517; 68 A. 404, 8 Del. Ch. 284; *Bank of Ireland v. McCarthy* (1898) A. C. 181.

<sup>2</sup> *Knight v. Knight*, (1895) 1 Ch. 499. See *Lloyd's Estate*, 174 Penn. St. 184.

<sup>3</sup> 61 Miss. 372; *Cook v. Lanning*, 40 N. J. Eq. 369; 32 Pa. Super. 187; 83 N. E. 18, 231 Ill. 508; 112 N. W. 101, 134 Iowa, 583. Hence, where one dies leaving an insufficiency of personal property to pay all general bequests, they must be adeemed wholly or *pro rata* unless there is something discoverable in the will, expressly or by inference, to denote an intention to charge one's real estate also with the payment. *Duvall's Estate*, 146 Penn. St. 176, 23 A. 231, and cases cited. Whether an executor, who is also a devisee, becomes personally or as executor bound to pay such legacies, depends upon his promise express or implied. *Ib.* Cf. *Evans v. Foster*, 80 Wis. 509, 14 L. R. A. 117, 50 N. W. 410; 488. Though land specifically devised may have to be sold to pay debts, etc., the surplus, if any, goes to such devisee. 87 Me. 63, 32 A. 784.

491. After the executor has once voluntarily paid a legacy without reservation, he cannot at discretion force the legatee to refund.<sup>1</sup> Creditors cannot, however, be debarred of their prior rights by the executor's imprudence or misconduct, but may in all cases pursue assets into the hands of legatees, where their own lawful demands remain unsatisfied; and the satisfied legatee, whether paid by the executor voluntarily or under the sanction of chancery, may, by chancery, be compelled to refund.<sup>2</sup> And it would appear consistent with our American probate practice to cause unsatisfied creditors, where the deficiency was occasioned by maladministration, to exhaust their remedies first against the executor or administrator and the sureties on his official bond.<sup>3</sup> And since creditors may compel legatees to refund, so the executor is sometimes substituted to their right for his own indemnity.<sup>4</sup>

491a. An executor or administrator who is also sole beneficiary for the residue, changes the character under which he holds the fund at the proper point and becomes residuary legatee or distributee.<sup>5</sup>

<sup>1</sup> 2 Ves. Sen. 194; *Coppin v. Coppin*, 2 P. Wms. 296; 5 Cranch, C. C. 658; Wms. Exrs. 1450. Local statutes sometimes change this rule. Where, however, assets are found deficient for meeting the lawful debts and charges, the executor may, by a bill in equity, compel legatees to refund what may have been already overpaid to them. Wms. Exrs. 1451; *Davis v. Newman*, 2 Rob. (Va.) 664, 40 Am. Dec. 764. The executor should come into the court "with clean hands," if he expects equity to aid him. See 77 N. C. 357; *McClure v. Askew*, 5 Rich. Eq. 162; *Harkins v. Hughes*, 60 Ala. 316. He has no such recourse while unappropriated assets remain for administration purposes. 1 La. Ann. 214. The executor's prudent course is to take a refunding bond from legatees, as against claims which may afterwards be presented within the time allowed by law; unless the estate is ample. *Supra*, 477; *McGlaughlin v. McGlaughlin*, 43 W. Va. 226, 27 S. E. 378; 31 Gratt. 602.

<sup>2</sup> 1 Vern. 162; *March v. Russell*, 3 My. & Cr. 31; 2 De G. & J. 693; *Buie v. Pollock*, 55 Miss. 309. Where chancery has administered the fund, however, a particular legatee may be required to refund only his proportionate share. *Gillespie v. Alexander*, 3 Russ. 130.

<sup>3</sup> *Pyke v. Searcy*, 4 Port. 52. A decree of the court directing a payment without security, will protect the executor. 154 Penn. St. 383, 25 A. 816. Cf. 477.

<sup>4</sup> See 83 Va. 539, 3 S. E. 142.

No legatee shall be allowed an unjust precedence, because of an executor's favor or misapprehension, where the assets were not originally sufficient, in fact, to pay all in full; but in such case equity will compel the legatees thus overpaid to contribute so as to make the whole proportionate abatement what it should have been. 1 P. Wms. 495; Wms. Exrs. 1452; *Galleo v. Attorney-General*, 3 Leigh, 450, 24 Am. Dec. 650. Otherwise, where assets, originally sufficient, have been wasted by the executor. See *ib.*; *Evans v. Fisher*, 40 Miss. 644. Trust funds, misapplied and distributed by the executor among legatees, may be recovered by a bill in equity. *Green v. Givan*, 33 N. Y. 343. Where specific legacies have not been paid, the residuary legatee may be pursued to whom the executor has made improper payment. *Buffalo Loan Co. v. Leonard*, 154 N. Y. 141, 47 N. E. 966.

<sup>5</sup> As to where he is to hold the fund as trustee or guardian, see 247. As to devolution of title as legatee or distributee, see 248. Where one is sole residuary legatee or distributee and all debts are paid, he may turn over to himself any outstanding claim of the estate and sue for it in his individual capacity. *Ewers v. White*, 114 Mich. 366, 72 N. W. 184.

## CHAPTER V.

## PAYMENT AND DISTRIBUTION OF THE RESIDUE.

492. **After the payment of debts and (if there be a will) of specific and general legacies, the final duty of the executor or administrator is to pay over or deliver what residue or surplus of the assets may remain to the person or persons duly entitled to the same.** In case of testacy, the residuary legatee or legatees, or, as the case may be, trustees selected to hold the residue for the purposes contemplated by the will, are the proper parties; but, where one died intestate, the residue goes to the person or persons designated by law and the statute of distributions. These two cases we now proceed to consider separately.

492a. **But the personal representative should deduct from the share to which each distributee is entitled whatever amount may be due by the latter, either as a debtor to the estate, or by reason of matters growing out of the settlement of the estate.**<sup>1</sup>

493. I. **As to the residue in case of testacy, after an executor has settled all lawful debts and charges against the estate which he represents, and has paid or delivered all the general and specific legacies according to the tenor of the will, he should transfer whatever personal property remains to the residuary legatee or legatees if such there be.**<sup>2</sup> And if such legatee dies after the testator, and pending a final settlement of the estate, his personal representatives will take the residue in his right.<sup>3</sup>

<sup>1</sup> See 208, *supra*; *Hoffman v. Hoffman*, 88 Md. 60, 40 A. 712; *Webb v. Fuller*, 85 Me. 443, 22 L. R. A. 177, 27 A. 346; *Fiscus v. Fiscus*, 127 Ind. 283, 26 N. E. 831. Where one's indebtedness equals or exceeds his distributive share he is entitled to nothing; but probate judgment does not lie for excess of debt. *Caldwell v. Caldwell*, 121 Ala. 598, 25 So. 825. As to permitting an executor or administrator to set off a debt due to his decedent against the legacy or distributive share payable, see also *Courtenay v. Williams*, 3 Hare, 539; *Hodgson v. Fox*, L. R. 9 Ch. D. 673; 23 W. R. 826; 28 W. R. 914; *Cutliff v. Boyd*, 72 Ga. 302. And see, as to setting off the representative's own advances, *Taylor v. Taylor*, L. R. 20 Eq. 155; *Kelly v. Davis*, 37 Miss. 76. See further, 37 Ala. 74, 76 Am. Dec. 347; 2 Sneed, 200; *Nelson v. Murfee*, 69 Ala. 598; 107 Ga. 108, 450, 73 Am. St. Rep. 135, 32 S. E. 951, 33 id. 425 (no distribution on an estate exhausted by widow's allowance).

<sup>2</sup> *Wms. Exrs.* 1454.

<sup>3</sup> *Cooper v. Cooper*, L. R. 7 H. L. 53. A residuary legatee, under a will, has a clear and tangible interest in the residue; and the next of kin stand, with regard to an intestate estate, in the same condition. *Cooper v. Cooper*, *ib.* Subject to the directions of the will, and such legatee's convenience, this residuary fund is turned over in money or other kinds of personalty, as the proceeds of a prudent administration.

494. Where there is no residuary legatee named or known, our modern local statute makes due and just provision.<sup>1</sup> Generally, if not universally, in the American States, the executor has been considered a trustee for the next of kin as to all residue in his hands undisposed of; and American statutes a hundred years old or more repudiate the notion that a beneficial interest should vest in him by mere virtue of his office where no residuary legatee is named.<sup>2</sup>

495. II. As to the residue in case of intestacy, the local statute of distributions fixes the standard.<sup>3</sup> To the unsatisfactory state of the earlier law we owe the first of our formal statutes of distribution,—one of those excellent enactments, following the Restoration, which have placed English jurisprudence upon a sound modern footing. This act provides in detail for distributing justly and equally the surplus of all intestate estates amongst the wife and children, or children's children, if any such be or otherwise

<sup>1</sup> *Attorney-General v. Hooker*, 2 P. Wms. 338; *Urquhart v. King*, 7 Ves. 288; Wms. Exrs. 1474, 1475. Formerly, in such a case, theory favored the executor's right to the surplus. But this favorable presumption of equity was overthrown by legislation. Act 11 Geo. IV, & Wm. IV, c. 40; Wms. Exrs. 1476; 1 Bro. C. C. 201; *Taylor v. Haygarth*, 14 Sim. 8. The effect of such legislation appears to be to put the burden of proof on the executor to show that the testator intended he should enjoy the residue beneficially. *Juler v. Juler*, 29 Beav. 34. But the statute is considered to apply only in cases where the testator has left next of kin, the executor becoming trustee for their benefit, and, accordingly, where there is no known next of kin, the executor will take the residue as against the crown, unless the intent of the testator to exclude his right affirmatively appear. 2 Coll. 648. For the English decisions under this statute, see Wms. Exrs. 1474-1482, and cases cited.

<sup>2</sup> 2 Story Eq. Jurisp. § 1208; Wms. Exrs. 1474, and cases cited; *Hays v. Jackson*, 6 Mass. 149; *Wilson v. Wilson*, 3 Binney, 557. And see 503, *post*.

The fact that the next of kin is likewise executor does not, of course, disentitle him from taking beneficially the residue which otherwise would have vested in him. But a pecuniary legatee's interest is not enlarged constructively by his appointment as an executor. *Browne v. Cogswell*, 5 Allen, 556. See *Reeve's Trusts*, *Re*, L. R. 4 Ch. D., as to a bequest to an executor, but not in that character. Negative words will not suffice to exclude any or all of one's next of kin from sharing beneficially in a residue undisposed of. *Clarke v. Hilton*, L. R. 2 Eq. 810.

Where executors applied to the court to construe the testator's will and made distribution in accordance therewith, in the exercise of due care and good faith, they are protected, although it turns out subsequently that the court's construction of the will was erroneous. *Fraser v. Page*, 82 Ky. 73. An executor cannot be compelled, by summary process for contempt, to make distribution. 81 Va. 395.

<sup>3</sup> As the law of England anciently stood, the ordinary, succeeding to the king's right, himself appropriated the residue of an intestate's estate as though for pious uses, giving certain portions to widow and children, if there were any. Later statutes compelled administration to be granted to the next relatives of the deceased; but here the person selected for the trust might make the office lucrative for himself, by enjoying the surplus, to the exclusion of other equal kindred to the intestate. For, as the temporal courts decided, the ordinary had no power to compel a distribution, notwithstanding such authority had long been assumed. 2 Bl. Com. 515; *Edwards v. Freeman*, 2 P. Wms. 441; Wms. Exrs. 529, 1483; 1 Lev. 223.

to the next of kindred to the dead person in equal degree, or legally representing their stocks, *pro suo cuique jure*.<sup>1</sup> By this statute, moreover, the ordinary spiritual court was empowered to take bonds, with sureties, from all administrators on their appointment, conditioned not only to exhibit an inventory, and administer the estate well and truly, but likewise to render a just account of one's administration, and deliver and pay the residue found due to such person or persons as the court should decree, pursuant to the terms of this act.<sup>2</sup> Statutes are to be found in all of the United States expressly directing the distribution of an intestate's personal, as well as the descent of his real estate, and differing in various details from one another, though based upon the English statute of Charles II.<sup>3</sup> It is likewise the American rule to require account and distribution by the administrator, under the direction of the probate court, and to insert corresponding conditions in the administration bond.<sup>4</sup>

496. **The surviving husband was entitled to the whole residue of his wife's personalty** and might also administer upon his wife's estate in preference to all others, as the old law stood; and, subject to the payment of such debts as bound him upon surviving her, he thus recovered her outstanding personal property to his own use and enjoyment.<sup>5</sup> So greatly, however, have the ancient rights of husband and wife been changed by modern legislation, both in England and the United States, that the present legal rule on this subject cannot be stated with precision.<sup>6</sup>

<sup>1</sup> Stat. 22 & 23 Car. II, c. 10. Details are given in Wms. Exrs. 1434, at considerable length. Admirable as is the policy of this statute, some English jurists have considered it, to use Lord Hardwicke's words, "very incorrectly penned." Stanley v. Stanley, 1 Atk. 457. See also Wms. Exrs. 1527-1549, as to the ancient doctrine of the *pars rationabilis* which once prevailed in parts of the realm, but is now of no practical consequence.

<sup>2</sup> See stat. ib; Wms. Exrs. 530, 531, 1484. As to language used in the court of probate act, stat. 20 & 21 Vict, c. 77, which substitutes probate jurisdiction for that of the old spiritual courts, see Wms. Exrs. 292. Under modern English practice, accordingly, the bond runs as conditioned to pay the residue to the persons entitled under the statute of distributions.

<sup>3</sup> 2 Kent Com. 426, and notes.

<sup>4</sup> *Supra*, 140. The persons among whom distribution should be made, and the method of making distribution, must therefore be determined by local statutes, and the procedure of the courts under them. See Table of Consanguinity, Appendix.

<sup>5</sup> His interest is a peculiar one, moulded by the peculiar laws of coverture under such a rule, and he is said to administer for his own benefit when he administers at all, and to acquire a title to his wife's personalty, fitly designated as a title *jure mariti* under the statute of distributions. Schoul. Dcm. Rel. § 196, etc.; 2 Bl. Com. 515; Watt v. Watt, 3 Ves. 246.

<sup>6</sup> 2 Kent Com. 136; Barnes v. Underwood, 47 N. Y. 351; Cox v. Morrow, 14 Ark. 608; Nelson v. Goree, 34 Ala. 565; Baldwin v. Carter, 17 Conn. 201, 42 Am. Dec. 735;

497. **As to a surviving wife's rights,** the English statute of distributions preserves the "widow's thirds," which the ancient common law had bestowed as her *pars rationabilis*; the remaining two-thirds of the deceased spouse's personalty going to his children or their representatives. The statute further provides, as likewise did the ancient law, that when the husband dies intestate, leaving a widow only, and no lineal descendant, the widow shall have a moiety or half of his personal estate; giving a husband's next of kin the other half.<sup>1</sup> In this country the statute of Charles II is at the basis of our legislation regarding the estates of intestates; but various modifications are found in the several States, to the greater favor of the surviving wife; and modern legislation at the present day is capricious in this respect, though tending to equalize the rights of surviving spouses in one another's property.<sup>2</sup>

498. **Concerning the rights of children and lineal descendants,** the English statute directs an equal distribution among the children of an intestate, after deducting the widow's third; or, if there be no widow or husband, the entire residue is portioned equally among them.<sup>3</sup> If any child was dead at the time of the intestate parent's death and yet left a child or children of his own then surviving, such child or children will take their own parent's share in the intestate's personalty, by what is termed the "right of legal representation."<sup>4</sup> American statutes, while recognizing these general rules,

Woodman v. Woodman, 54 N. H. 226; Wilson v. Breeding, 50 Iowa, 629; Holmes v. Holmes, 28 Vt. 785. See statutes of the several States regulating this subject; also Schoul. Dom. Rel. Pt. 2, c. 15, and cases cited. The statute 29 Car. II was never in force in Illinois; and the husband must distribute according to the local statute of distributions. Townsend v. Radcliffe, 44 Ill. 446.

As to curtesy at the common law, or the surviving husband's potential life interest in his wife's lands, where a child was born of the marriage, and substitutes for this right under some late American statutes, see Schoul. Dom. Rel. ib.; 2 Kent Com. 134; 1 Washb. Real Prop. 128.

<sup>1</sup> Stat. 22 & 23 Car. II, c. 10. As to the statute and custom of London, taken together, which provided more favorably for the widow than the statute alone, see Wms. Exrs. 1530. Nor more than one-half can the widow take by such distribution, under any circumstances; for, where there are no next of kin, the other half goes to the crown. 2 Bl. Com. 515, 516; 2 Kent Com. 427; Cave v. Roberts, 8 Sim. 214.

<sup>2</sup> See Schoul. Dom. Rel. Pt. 2, c. 16; the latest local codes; 2 Kent Com. 11th ed. 427, 428.

A surviving spouse's rights may be barred by antenuptial settlement, etc. Divorce excludes such rights. The wife's dower interest (or life-third) of her husband's lands should also be noted. See Schoul. Dom. Rel. Pt. 2, cs. 15, 17.

<sup>3</sup> Where the intestate has left only one child, the statute by implication provides for such child, giving him the entire two-thirds, or, in case of no surviving widow or husband, the entire residue. Wms. Exrs. 1495, 1497; Carth. 52.

<sup>4</sup> Price v. Strange, 6 Madd. 161; 3 Bro. C. C. 226; Wms. Exrs. 1496. This right of representation extends to lineal descendants in the remotest degree, the descendants of a deceased heir, as a class, being substituted to the share their own parent would

specify how far the right of representation shall apply; a principle which might well avail among collateral kindred, and in landed inheritance, but whose extent, under the act 22 & 23 Car. II., is not precisely determined.<sup>1</sup> Children of the half blood are entitled to share equally with those of the whole blood; a rule applicable where the parent married more than once, and had offspring by the different marriages.<sup>2</sup> And this rule extends generally to kindred of the half blood in the same degree. A posthumous child, too, or one born after the death of the parent, inherits, whether of the whole or half blood, in the same manner as if born during the lifetime of the parent and surviving him.<sup>3</sup>

499. **Advancements to children are taken into account** under the English statute of distributions; and, if the father, during his lifetime, makes an advancement to any of his children, towards their distributive share, the rule is to deduct this in making distribution.<sup>4</sup>

have taken if living; though exclusive of such parent's widow. But representation applies only where one or more of them of a nearer degree to the intestate survived him, while such as did not, left descendants instead, the right to take *per stirpes*, thus equalizing a distribution among those of the nearest degree; for, were all the children of the intestate dead, and only grandchildren left, the grandchildren would be, in fact, the next of kin surviving, and, as equal members, take *per capita*; while, as between grandchildren and the surviving children of a deceased grandchild, supposing such a case to have occurred, the right of representation as *per stirpes*, would once more operate. 2 Bl. Com. 517; Bac. Abr. tit. Exors. I, 3; Wms. Exrs. 1497, 1498.

<sup>1</sup> *Semble*, that, as long as there are lineal descendants, the division must be *per stirpes*. See Ross's Trusts, L. R. 13 Eq. 286. Inheritance or succession "by right of representation" takes place in general when the descendants of a deceased heir take the same share or right in the estate of another person that their parent would have taken if living. And see North's Estate, *Re*, 48 Conn. 583.

<sup>2</sup> 1 Mod. 209; Carth. 51; Wms. Exrs. 1496; 2 Kent. Com. 424; Crook v. Watt, 2 Vern. 124. Children by different fathers or by different mothers may be brothers or sisters of the "half blood," in the sense of that word.

<sup>3</sup> 2 Kent. Com. 424; Edwards v. Freeman, 2 P. Wms. 446; Wms. Exrs. 1497. And see local statute. On such points, statutes of distribution in our American States are sometimes found explicit; providing, also, for other cases, where the common law was either harsh or uncertain, as in the instance of illegitimate children. The rights and disabilities of illegitimate children, as well as the status of legitimacy, are considered at length in Schoul. Dom. Relations, Pt. 3, ch. 1, § 6. So highly favored are the equal rights of children or lineal descendants in this country, that provisions may be found in our various codes, restraining the parental right, or, at all events, presuming strongly against the parental intention to deprive any one of them of the equal benefits of his will. 2 Kent. Com. 421; 4 Kent. Com. 471. And see local code; Book I, 20.

<sup>4</sup> Stat. 22 & 23 Car. II, c. 10, § 5; Wms. Exrs. 1485, 1498; 2 P. Wms. 435; 2 Bl. Com. 517. And see Dallmeyer, *Re*, (1896) 1 Ch. 372. As to the deceased father, the statute takes away nothing which has been once received by a child; but only his distributive share can be affected by such computation, unless he chooses to relinquish more; and the rule of hotchpot applies only to cases of actual and complete intestacy. Walton v. Walton, 14 Ves. 324; Edwards v. Freeman, 2 P. Wms. 443. See further, Kircudbright v. Kircudbright, 8 Ves. 51; 2 P. Wms. 560 (hotchpot or election).

As to the English rule of advancements, see further, Edwards v. Freeman, 2 P. Wms. 440; Weyland v. Weyland, 2 Atk. 635; Wms. Exrs. 1502-1505; 1 Atk. 403; 8 Ves. 51; 31 Beav. 583; Boyd v. Boyd, L. R. 4 Eq. 305; Bennett v. Bennett, L. R. 10 Ch. D. 474.



500. In this country, the rule of advancements does not appear to be so strict, more stress being usually laid upon mutual intention at the date of the transaction than upon the equity of distributing to all children alike. It is true that advancements are in some States reckoned by a legal inference similar to that which the English cases uphold; nor is it unfrequently held that a gift, either of land or money, which is made to a child or other heir, by a person who afterwards dies intestate, shall be presumed an advancement;<sup>1</sup> as where, for instance, the provision was calculated to aid directly and advance a child when starting in life. But, generally, all such presumptions may be readily overcome by proof of actual intent;<sup>2</sup> while, in some States, the statutes of distribution, unlike the English, permit nothing to be reckoned as an advancement to a child by the father, unless proved to have been so intended, and chargeable on the child's share by certain evidence prescribed.<sup>3</sup>

<sup>1</sup> See *Meadows v. Meadows*, 11 Ire. L. 148; 2 Story Eq. Juris. § 1202; *Parks v. Parks*, 19 Md. 323; *Grattan v. Grattan*, 18 Ill. 167, 65 Am. Dec. 726; *Creed v. Lancaster Bank*, 1 Ohio St. 1; 4 Kent Com. 419; *Hollister v. Attmore*, 5 Jones Eq. 373; *Fellows v. Little*, 46 N. H. 27; 85 Tenn. 430, 3 S. W. 649.

<sup>2</sup> *Smith v. Smith*, 21 Ala. 761; *Parks v. Parks*, 19 Md. 373; 81 Am. Dec. 639; *Phillips v. Chappel*, 16 Geo. 16; *Bay v. Cook*, 31 Ill. 336.

<sup>3</sup> *Hartwell v. Rice*, 1 Gray, 587; 22 Pick. 508; 4 Kent Com. 418; *Porter v. Porter*, 51 Me. 376; *Adams v. Adams*, 22 Vt. 50; *Johnson v. Belden*, 20 Conn. 322; *Mowrey v. Smith*, 5 R. I. 255. See also *Schoul. Dom. Rel.*, 273; *Vanzant v. Davies*, 6 Ohio St. 52; *Vaden v. Hance*, 1 Head, 300; 119 Ill. 151, 170, 8 N. E. 801, 796. As to grandchildren *per capita*, see 2 Jones (N. C.) 41, 62 Am. Dec. 190. A gift mutually so intended cannot be subsequently treated by the father as an advancement, without at least the child's knowledge or consent. *Lawson's Appeal*, 23 Penn. St. 85; *Sherwood v. Smith*, 23 Conn. 516. On the other hand, bonds or promissory notes held by an intestate parent against his child, or the transfer of money upon an account stated, when expressed in the usual form, justify rather the presumption that there was a loan and not a gift or advancement intended. *Vaden v. Hance*, 1 Head, 300; *Bruce v. Griscom*, 16 N. Y. Supr. 280; *Batton v. Allen*, 5 N. J. Eq. 99, 43 Am. Dec. 630; 42 N. J. Eq. 15, 633, 6 A. 286, 8 A. 312; 70 Ala. 484; *West v. Bolton*, 23 Geo. 531, 45 Am. Rep. 88. But as to notes long outlawed, see 23 S. C. 456. All such presumptions may be rebutted; and, to the facts and circumstances attending the transaction, and, likewise, to declarations of the one as part of the *res gesta*, and admissions by the other, much weight is attached. An advancement may be changed into a gift, but *vice versa* less readily. See *Mitchell v. Mitchell*, 8 Ala. 414; *Manning v. Manning*, 12 Rich. Eq. 410; 71 Ga. 544, 43 So. 301; 23 Penn. St. 85; *Miller's Appeal*, 31 Penn. St. 337; 110 Ind. 444, 11 N. E. 312; *Sherwood v. Smith*, 23 Conn. 516. Evidence of the mutual intention, in short, is regarded with great favor where the deceased parent has not given express directions by his will. The advancement being made and accepted, the incidents to an advancement follow. *Nesmith v. Dinsmore*, 17 N. H. 515. As under the English rule, there must be a complete act of the parent during his life divesting himself of the property to constitute an advancement. *Crosby v. Covington*, 24 Miss. 619. A contemporary writing or the peculiar tenor of a promissory note or other security may show that an advancement was intended. *Kirby's Appeal*, 109 Penn. St. 41; 90 Mo. 460, 2 S. W. 413. Or it may show the reverse. 16 Lea, 453. Circumstantial evidence bears on the issue. 58 Mich. 152, 24 N. W. 549. An advance by the father may consist in paying his child's debts. 85 Tenn. 430, 3 S. W. 649. As to impounding a child's share to pay a judgment recovered, see 65 Md. 69, 153, 5 A. 294, 4 A. 402. As to a remainder-man's debt, see *Broas v. Broas*, 116 N. W. 1077, 153 Mich. 310.

Where at all events it clearly appears that the decedent intended a gift, the gift will not be treated as an advancement.<sup>1</sup>

501. **General distribution among the next of kin applies**, in default of surviving husband, widow, children, or lineal issue. Under the English and American statutes of distribution, next of kin more distant than children and their representatives may, we have seen, be entitled to share with the widow, or, in some of our States, with the surviving husband; and the statute rule is, that if there be no wife, surviving husband, or lineal issue, then all the personal estate must be distributed among the next of kin of equal degree. The rules of consanguinity already stated in connection with the right of taking out administration should here be applied once more.<sup>2</sup> If the intestate leaves no husband, widow, or issue, and no father, mother, brother nor sister, his personal estate goes to

It is a general rule in the United States (confirmed by statute in some States), that while an advancement must be taken by a child towards his share, as regards a distribution of the estate, so as to abate or extinguish his distributive rights, no child shall be required to refund any part of the sum advanced to him, although it should exceed his share. *Black v. Whitall*, 9 N. J. Eq. 572, 59 Am. Dec. 423; *Cushing v. Cushing*, 7 Bush, 259. And see 499, note.

<sup>1</sup> *Morgan, Re*, 104 N. Y. 74, 9 N. E. 861.

As to the rule of hotchpot or election in this country, see *Jackson v. Jackson*, 28 Miss. 674, 64 Am. Dec. 114; 2 Kent Com. 421; *Barnes v. Hazleton*, 50 Ill. 429; *Knight v. Oliver*, 12 Gratt. 33; 1 Mo. App. 294. Statutes are to be found in various States on this subject. *Ib.* In this case, and, in general, wherever the value of an advancement is to be ascertained, the value of the property at the time of the advancement governs in the distribution, and interest should not be reckoned. *Jenkins v. Mitchell*, 4 Jones Eq. 207; Such a rule is sometimes defined by local statute. See 17 Mass. 356; *Nelson v. Wyan*, 21 Mo. 347; 18 N. Y. Supr. 523.

<sup>2</sup> *Supra*, 101. And see table in Appendix. Both English and American statutes regard the father with much favor under such circumstances. And under the statute 22 & 23 Car. II, c. 10, if the intestate thus dying left a father, the father was entitled to the whole of the personal estate to the exclusion of all others; the mother coming next in order, but even thus, under the amended act, having to share with brothers and sisters of the deceased, if there were such. *Blackborough v. Davis*, 1 P. Wms. 51; Stat. 1 Jac. II, c. 17; Wms. Exrs. 1506-1508, and cases cited. The English statutes on this point are carelessly drawn; but various American codes express the idea very clearly. American policy tending, however, in later times, to place parents upon a more equal footing as to their own children, we find that some States now require distribution to father and mother in equal shares, where both survive; or, at all events, prefer, in degree, either surviving parent—the other being dead—to brothers and sisters of the deceased. *Oliver v. Vance*, 34 Ark. 564, local statute. It has been decided, under the English statute, that, in default of parents, the brothers and sisters of the deceased are to be preferred to a grandparent, notwithstanding all, in legal strictness, are of the same degree; and this preference, which is founded in natural reason, American codes have expressly conceded, though grandparents are admitted to outrank uncles and aunts, under the English reckoning. *Freem*. 95; 3 Atk. 762, 763; *Ambl*. 191; Wms. Exrs. 1509, 1510. See local codes. It is sometimes provided by way of qualifying the distribution among the next of kin in equal degree, that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor shall be preferred to those claiming through an ancestor who is more remote.

his next of kin in equal degree; and, as to these, our codes of distribution rarely specify more particularly the parties entitled.<sup>1</sup>

502. **The right of representation among collaterals is disfavored** where the next of kin are more remotely related to the intestate than brothers and sisters. Hence, where the intestate leaves surviving an uncle or aunt and the son of another uncle or aunt deceased, the latter, under the English statute, can take nothing; and hence, too, surviving nephews and nieces become distributees, regardless of the child of a deceased nephew or niece. A corresponding limitation may be found, more or less precisely expressed, in American codes; which, likewise, incline to treat lineal kindred, and brothers and sisters, more favorably than more remote collateral kindred in respect of representation.<sup>2</sup>

503. **Where the deceased intestate has left no known husband, widow, or next of kin**, the residue, after paying all debts, belongs, by English law, to the crown, as *ultimus haeres*;<sup>3</sup> and, under our American codes, the residue reverts or escheats in like manner to the State.<sup>4</sup>

504. **The due time and method of distribution** should be observed. Distribution is necessarily postponed to the lawful adjustment of

<sup>1</sup> But it is observable, that in various American States it is distinctly prescribed that the degrees of kindred shall be computed according to the rules of the civil law. See local statute. 1 Bradf. Sur. (N. Y.) 495; table in Appendix. Half-blood kindred, in the same degree, are to inherit equally with those of the whole blood, as our local statutes not unfrequently declare, and the English decisions concede. The English cases extend this doctrine to posthumous brothers and sisters of the half blood. *Show P. C.* 108; *Burnet v. Mann*, 1 Ves. Sen. 156; *Wms. Exrs.* 1511.

<sup>2</sup> 2 Vern. 168; *Powers v. Littlewood*, 1 P. Wms. 595; *Wms. Exrs.* 1486, 1512; 2 Kent Com. 425; 2 N. H. 460; 11 Gill & J. 346; *Bigelow v. Morong*, 103 Mass. 287; *Hatch v. Hatch*, 21 Vt. 450; *Adee v. Campbell*, 79 N. Y. 52. And see further, as to children of deceased brother, etc., *Conant v. Kent*, 130 Mass. 178; 18 N. Y. Supr. 344.

It should always be borne in mind, that as husband and wife are not legally next of kin to one another, so distribution, and those other rights which pertain to kinship, cannot be predicated of a mere connection by marriage; on the contrary, there must be common blood in the intestate and those claiming to be entitled to share as kindred. And among kindred are three classes: those in the ascending line, those in the descending, and those in the collateral. *Bouv. Dict.* "Kindred." And see Table, *post*.

<sup>3</sup> *Megit v. Johnson*, Dougl. 548; *Taylor v. Haygarth*, 14 Sim. 8.

<sup>4</sup> See local code; *Parker v. Kuckens*, 7 Allen, 509; *Fuhre v. State*, 55 Ind. 150. But, while American policy appears to regard the State official who may thus receive the balance as a sort of trustee for the benefit of those who may hereafter prove to have lawful claims thereon, but in final default of such claimants, for the public, it is held in England that the crown shall take the residue personally and beneficially at once. Indeed, English sovereigns have been accustomed to grant such property to their own favorites by letters patent or otherwise, reserving, perhaps, one-tenth part for the royal chest; though the long pendency of administration proceedings in chancery, under a bill in equity, may often afford to absentees an ample opportunity to appear and assert their rights before such final distribution is awarded. *Wms. Exrs.* 433, 434, 1515; 2 Bl. Com. 505, 506. The estate of bastards, as of persons having no kindred, passed in like manner to the sovereign, by the common law.

debts due from the estate to its creditors.<sup>1</sup> Upon a final settlement of the administration accounts, in American practice, distribution, if sought, should be granted.<sup>2</sup> But it is usual to postpone such decree until the time has fully elapsed for settling the debts. A decree for partial distribution is provided in the practice of some States; such decree being conclusive only as to the funds then distributable, and assets being reserved for further liabilities connected with the administration.<sup>3</sup> Where the persons entitled are well known to the representative, both as to legal right and identity, payment is usually made without the formality of procuring a decree of distribution from the court.<sup>4</sup> But where questions affecting such rights are pending, distribution should neither be made nor decreed.

**504a. A decree of distribution should specify the distributees; also the personal representative of any deceased distributee as the person to receive the share.<sup>5</sup> The errors or inequalities of a partial**

<sup>1</sup> The English statute of distributions directs that no distribution shall be made till after a year from the intestate's death, and that distributees shall give bond to indemnify the administrator in ratable proportion if lawful debts afterwards appear. Wms. Exrs. 1486; stat. 22 & 23 Car. II, c. 10, § 8. American statutes proceed upon the same general theory; usually permitting, however, that the estate shall continue unsettled until the statute period for presenting claims shall have expired. A court has no jurisdiction to order a final distribution during the time that creditors may present claims under statute. 151 Mass. 595, 25 N. E. 23. Cf. 107 N. C. 168, 11 S. E. 1051. And see *Lewis v. Mason*, 84 Va. 731, 10 S. E. 529.

<sup>2</sup> *Pritchett's Estate*, Re, 52 Cal. 94. Cf. local statute as to a distribution, whether total or partial. See also, 57 A. 1118, 208 Pa. 636 (right to refunding bond); 5 Dana, 520; *Richmond v. Delay*, 84 Miss. 83; *Johnston v. Fort*, 30 Ala. 78; 1 Grant (Pa.) 361; *Hays v. Matlock*, 27 Ind. 49; Part VII, c. 1, *post*.

<sup>3</sup> *Kline's Appeal*, 86 Penn. St. 363; *Harrison v. Meadors*, 41 Ala. 274; *Curtis v. Brooks*, 71 Ill. 125.

<sup>4</sup> 166 Mass. 366, 44 N. E. 446; 46 S. W. 199, 144 Mo. 448; 76 N. W. 18, 55 Neb. 565 (risk incurred). See Part VII, c. 1, *post*. A decree of distribution in a final settlement is inconclusive on a minor for whom no guardian *ad litem* was appointed. *Conwill v. Conwill*, 61 Miss. 202. Money is sometimes paid into court for distribution on the settlement of the estate. 93 Ind. 173. But the practice in some States is for the decree to issue to the administrator, who procures the receipts of all the distributees named, and then returns the full document to be filed at the probate registry. Decree of distribution not appealed from affords a protection to the representative, and is a judgment *in rem* binding upon all concerned. 52 P. 132, 120 Cal. 79; 68 N. E. 445, 204 Ill. 571; 128 Mass. 140 (no collateral impeachment); 93 N. W. 253, 132 Mich. 208; 101 N. W. 68, 93 Minn. 233. As to erroneous decision, see 54 N. Y. S. 205; 49 P. 210, 117 Cal. 348.

As to the public administrator's final deposit of unclaimed balance, see local statute; 24 Pick. 315; *Commonwealth v. Blanton*, 2 B. Monr. 393; *Fuhrer v. State*, 55 Ind. 150. But, if there be known kindred, a public administrator should distribute among them. *Parker v. Kuckens*, 7 Allen, 509. 56 Vt. 187.

<sup>5</sup> An order which in effect requires payment to the next of kin is erroneous and insufficient for protection. *Grant v. Bodwell*, 78 Me. 460, 7 A. 12. The local statute should be followed. Notice, as to form and sufficiency, is within the court's discretion. 170 Mass. 295, 49 N. E. 440. But an error in a decree of partial distribution may be cured on the next distribution. *Dickinson's Appeal*, 54 Conn. 224, 6 A. 422 (local

distribution may be rectified on a subsequent or final distribution.<sup>1</sup> And so, too, should the representative's proper claims upon the fund, and all other equities, be duly provided for, before a final division.<sup>2</sup>

505. Distribution applies, in general, to personalty alone; the real estate of the decedent descending to his heirs. The surplus of the proceeds of a sale of realty, after payment of debts, may be distributed among the heirs or those claiming under them.<sup>3</sup>

506. The reduction of the surplus to cash would seem to be necessary in order to distribute strictly under a decree of distribution. But such a course must sometimes be highly disadvantageous, in these times, especially where the estate is a large one; and it is preferable, wherever the distributees can be brought into accord, to make a division specifically or in kind, save so far as a sale may have been necessary for the security and benefit of the estate in course of administration.<sup>4</sup> Under all circumstances, however, distributees should be equally dealt with, and upon a just valuation of the property, and the administrator should stand impartial as among them.<sup>5</sup>

practice). An *ex parte* decree of distribution, which does not follow the statute, fails to protect. *Shriver v. State*, 65 Md. 278, 4 A. 679. See as to the framing of a decree, 4 Dem. 24. And as to payment into court for unknown parties, see local code. A decree is sometimes opened and amended upon a suitable state of facts. 4 Dem. 30. An order of distribution obtained by fraud may be set aside, so long as rights are not confirmed by limitations. *Leavens's Estate*, 65 Wis. 440, 27 N. W. 324.

<sup>1</sup> *Yetter's Estate*, 160 Penn. St. 506, 28 A. 847.

<sup>2</sup> See 141 N. Y. 21, 35 N. E. 961.

<sup>3</sup> *Harris v. Ingalls*, 64 A. 727, 74 N. H. 35; *Sears v. Mack*, 2 Bradf. 394; Part VI, *post*; 70 N. W. 442, 112 Mich. 118.

<sup>4</sup> *Evans v. Inglehart*, 6 Gill & J. 171; *Hester v. Hester*, 3 Ired. Eq. 9; *Reed's Estate*, 82 Penn. St. 428. Local statutes sometimes provide for a specific distribution of personal property in certain cases. *Rose v. O'Brien*, 50 Me. 188. If shares of specific property are not exactly equal, the balances may be made up in money. *Williams v. Holmes*, 9 Md. 281. Where those interested in the estate divide among themselves the effects of an intestate, the administrator has usually no cause of complaint. *Weaver v. Roth*, 105 Penn. St. 408. Local codes are found on this point with a discriminating authority. 115 Ill. 83, 3 N. E. 505. As to compromising on such money rights, see 71 Ala. 258.

<sup>5</sup> *Lowry v. Newsom*, 51 Ala. 570; 82 Penn. St. 428 (consent of residuary parties to share assets and not reduce to cash must be respected); *Thompson, Re*, 71 N. E. 1140, 178 N. Y. 554; 44 S. E. 47, 1007, 132 N. C. 476. If, on final settlement of the administrator's accounts, the assets are partly gold and partly currency, each distributee should have his fair share of each kind. *Ib.* See 27 La. Ann. 228.

An administrator should not distribute nor suffer a decree of distribution to be entered, regardless of claims of creditors brought to his notice which might reduce the surplus. *Clayton v. Wardwell*, 2 Bradf. 1; 33 Miss. 134.

Distributees have, of course, no right to sue for and recover claims due their intestate's estate pending a settlement, for this is a fundamental right of the administrator. *Kaminer v. Hope*, 9 S. C. 253. And until distribution of an estate is made, legal title to the assets remains in the representative, no matter where the possession may be. Hence, shares of the distributees cannot be reached by garnishment pending the ad-

507. Descent is cast, and rights of distribution are vested, upon the death of the intestate ancestor or person whose estate is to be administered; hence the subsequent death of a distributee transfers his interest to his personal representative.<sup>1</sup>

508. A refunding bond should be taken for protection from each distributee, wherever the administrator makes voluntary distribution, before creditors' claims are barred, since otherwise he cannot require contribution if compelled to pay such claims, according to the rule of some States;<sup>2</sup> a rule announced, however, not without admitted exceptions.<sup>3</sup> Generally speaking, no partial distribution

ministration. *Selman v. Milliken*, 28 Ga. 366. But, after lapse of the time for presenting claims and a final settlement by the administrator, including the payment of debts and distribution, the property divided among the distributees, or held by them in common, may become liable for their respective debts, or be made available for their own benefit. See *Humphreys v. Keith*, 11 Kan. 108; *Pratt v. Pratt*, 22 Minn. 148; *Brashear v. Williams*, 10 Ala. 630. See also, 3 Dem. 567 (assignment of right by distributee); *Johnson v. Longmire*, 39 Ala. 143; *supra*, 120. As to the legal title of distributees, where there is no administration, and no necessity for one, see *Andrews v. Brumfield*, 32 Miss. 107.

After an estate has been distributed, distributees cannot treat the settlement as illegal or void, on account of an irregularity in the proceedings, without restoring, or offering to restore, what they have received under the settlement. *McLeod v. Johnson*, 28 Miss. 374.

A fair transfer of assets, corporeal or incorporeal, which a beneficiary of the estate knowingly accepts as the equivalent of cash is to be regarded as an actual payment in cash. *Hawthorne v. Beckwith*, 89 Va. 786, 17 S. E. 241; *Richardson, Re*, (1896) 1 Ch. 512.

<sup>1</sup> If, therefore, the surviving widow of an intestate dies before the personal estate has been distributed, her share or surplus will devolve upon her own personal representatives. *Wms. Exrs.* 1526; *McConico v. Cannon*, 25 Ala. 462; *Poster v. Fifield*, 20 Pick. 67; *Moore v. Gordon*, 24 Iowa, 158; *Kingsbury v. Scovill*, 26 Conn. 349; *Puckett v. James*, 2 Humph. 565. Cf. *Maxwell v. Craft*, 32 Miss. 307. And so correspondingly with a surviving husband or one next of kin to a deceased person entitled in like manner. As to the husband's death, pending settlement of his wife's estate, a circuitous course was formerly taken in English practice. *Roosevelt v. Ellithorpe*, 10 Paige, 415; *Fielder v. Hanger*, 3 Hagg. Ec. 770. And see 483.

Where any of the distributees of the estate have died, their legal representatives should be brought in before a final settlement of the estate is allowed in court. *Hall v. Andrews*, 17 Ala. 40. The case resembles that of a residuary legatee who dies before his surplus is ascertained. *Cooper v. Cooper*, L. R. 7 H. L. 53.

Where one of the distributees died before settlement and the administrator paid part of his share for the support of such distributee's family, he was allowed a credit in equity, where it was shown that creditors and others in interest did not suffer in consequence. 95 N. C. 265. See further, *Lyle v. Williams*, 65 Wis. 231, 26 N. W. 448 (advances); 63 Cal. 520.

<sup>2</sup> *Moore v. Lesueur*, 38 Ala. 237; *Musser v. Oliver*, 21 Penn. St. 362; *supra*, 506; 43 W. Va. 226, 27 S. E. 378.

<sup>3</sup> *Alexander v. Fisher*, 18 Ala. 374; 11 Ala. 264. Such refunding bonds are usually taken with reference to claims of creditors, and not by implication, so as to recover for an excess paid by way of distribution. *State v. McAleer*, 5 Ired. L. 632; *Robinson v. Chairman*, 8 Humph. 374; *Simpson's Appeal*, 109 Penn. St. 383. That the court has discretion in requiring a refunding bond, see 98 Cal. 654, 33 P. 726. Where the administrator has sufficient funds for his own reimbursement, he cannot recover for making excessive payment to a distributee; and his negligence or default may debar him in other cases from procuring reimbursement; though creditors might, on their

will afford protection to an executor or administrator unless he has the court's sanction.<sup>1</sup>

**508a. A civil action against executor or administrator, after sufficient time has elapsed for claims, and the sole duty of the representative is to pay the legacies, or to make distribution, and he fails to do so, is sometimes given as for his breach of duty, without waiting for an order of distribution by the probate court.<sup>2</sup> But no such suit can be maintained unless the facts furnish full justification.<sup>3</sup>**

own behalf, if not themselves at fault, pursue assets into the hands of the distributees. Rice (S. C.) Ch. 110; 4 W. & S. 501; *Donnell v. Cook*, 63 N. C. 227; Wms. Exrs. 883, 1450, 1452. And see *supra* as to payments by executors (491), which indicates that the equity rule is more liberal than that of the common law in such cases. Cf. local code and practice. Of course, a written receipt or release from each distributee should be prudently taken. And see 57 A. 1118, 208 Pa. 636. If the representative fails to take a refunding bond from the next of kin where he pays before creditors are debarred from pursuing their claims, he makes himself personally liable to the creditors, at all events, for the amount he has distributed, and honest error will not shield him. *Jones's Appeal*, 99 Penn. St. 124; 13 Phila. 350. But as to acting with due regard to the supposed rights of creditors in such a case, see *Graves v. Spoon*, 18 S. C. 386. Local codes provide that the administrator need not distribute until the time has elapsed for ascertaining what the true balance above the debts shall be, and earlier distribution should not be expected by kindred unless they give a suitable refunding bond.

<sup>1</sup> 88 Md. 60, 62, 40 A. 712.

<sup>2</sup> See as to distributees, 33 Miss. 134; 10 B. Mon. 62; 24 Miss. 150 (tender of a refunding bond). But rights of creditors should be protected according to the exigency. 33 Miss. 134.

<sup>3</sup> *Clarke v. Sinks*, 144 Mo. 448, 46 S. W. 199. Hence the safer course is to apply to the probate court. *Schaub v. Griffin*, 84 Md. 557, 36 A. 443; 79 Md. 357, 32 A. 1054.

## PART VI.

GENERAL POWERS, DUTIES, AND LIABILITIES OF  
EXECUTORS AND ADMINISTRATORS  
AS TO REAL ESTATE.

## CHAPTER I.

## REPRESENTATIVE'S TITLE AND AUTHORITY IN GENERAL.

509. The real estate of a decedent descends at once to his heirs or devisees, as we have already seen, and the personal representative has no inherent authority or title thereto under his appointment.<sup>1</sup> An administrator, more especially, takes neither estate, title, nor interest in the realty of his intestate.<sup>2</sup> Nor has an executor authority over real estate, unless the testator expressly confers such power by his will,<sup>3</sup> and, even though thus empowered, whether to sell or dispose of the decedent's land, or to lease it, or to mortgage it, or to invest, re-invest, or change investments of real estate, such power is confined to the methods and purposes therein expressed.<sup>4</sup> If the executor or administrator has an interest of his own personally in such land, his deed can convey no more than his own personal interest.<sup>5</sup>

<sup>1</sup> *Supra*, 212-214, and cases cited; Wms. Exrs. 650. As to what is real estate, and not personalty, see 198-228, *supra*.

<sup>2</sup> *Supra*, 212; 4 Mass. 354; Stearns v. Stearns, 1 Pick. 157; Walbridge v. Day, 31 Ill. 379, 83 Am. Dec. 227; Vance v. Fisher, 10 Humph. 211; Gregg v. Currier, 36 N. H. 200. Nor has the widow an inherent authority. Williams v. Williams, 118 Mich. 477, 76 N. W. 1039. An administrator has nothing to do with real estate, or title thereto of the deceased, save for the benefit of creditors and payment of debts. Gladson v. Whitney, 9 Iowa, 267; Crocker v. Smith, 32 Me. 244; Spears Eq. 399. He cannot sue for rents, income and profits of land where there are no debts to be paid. 108 Ala. 105. But see next c. (local statutes).

<sup>3</sup> Wms. Exrs. 650; Gregg v. Currier, 36 N. H. 200. And see Place, *Re*, 1 Redf. 276.

<sup>4</sup> James v. Beesly, 4 Redf. (N. Y.) 236; Wms. Exrs. 650, 654, 944, 951; Hauck v. Stauffer, 28 Penn. St. 235; Thompson v. Schenck, 16 Ind. 194; Brown v. Kelsey, 2 Cush. 243; Hawley v. James, 16 Wend. 61.

<sup>5</sup> Fields v. Bush, 94 Ga. 664, 21 S. E. 827.

<sup>6</sup> Accordingly an executor or administrator has no inherent authority to make leases of the real estate belonging to his decedent's estate. 2 W. Bl. 692; Bank v. Dudley, 2 Pet. 492, 7 L. Ed. 496; 4 Bush, 27; Lee v. Lee, 74 N. C. 70. Otherwise, however, as to dealing with leases granted to his decedent, which are chattels real. *Supra*, 353. Hence the concurrence of legatees or distributees may often be desirable. See Taylor Landl. & Ten. 134; 3 East, 120; 8 Sim. 217. Nor to grant an easement or right of way



510. If the representative takes possession of the decedent's real estate, and collects rents, he is generally understood to hold the money in trust for the devisees or heirs; and to such parties he should account justly for his management, according to their respective interests.<sup>1</sup> Authority may be conferred and revoked by heirs or devisees for this purpose,<sup>2</sup> and the representative who collects without their authority is liable to them.<sup>3</sup> Under the authority conferred by a will, again, the executor may, of course, manage his testator's real estate; and, if the will orders a special disposition of rents, issues, and profits, he should comply with its

therein. *Hankins v. Kimball*, 57 Ind. 42. Nor to bring ejectment, or sue for trespass, where the right originates after the decedent's death. *Wms. Exrs.* 632, 792; 2 Root. 438; *Aubuchon v. Lory*, 23 Mo. 99. Cf. 23 Fla. 90, 11 Am. St. Rep. 334, 1 So. 516. He has no inherent power to sell the land; and his conveyance, invalid for want of power in him to make it, appears to leave the title in the heirs or devisees, while he cannot be charged with its value officially as assets of the estate. *King v. Whiton*, 15 Wis. 684; *Hankins v. Kimball*, 57 Ind. 42; 3 Rich. 418, 45 Am. Dec. 778; *Fay v. Fay*, 1 Cush. 105; 65 Conn. 161, 32 A. 396. See *Dix v. Morris*, 66 Mo. 514. He cannot charge the decedent's real estate by his building contracts. 54 Kans. 770, 39 P. 694. He cannot recover possession of the decedent's land by a suit at law. *Drinkwater v. Drinkwater*, 4 Mass. 354. Nor are the proceeds of a sale of such land, made by order of a court having no competent jurisdiction, assets in his hands. *Pettit v. Pettit*, 32 Ala. 238. Nor should he invest in land nor apply personal assets to repairs and improvements of the decedent's real estate, even though his decedent had agreed to make them. *Cobb v. Muzzey*, 13 Gray, 57. See 1 Bailey Ch. 23; 2 Hill Ch. 215; *Clark v. Bettelheim*, 144 Mo. 258, 46 S. W. 135. See *Richardson v. McLemore*, 60 Miss. 315. See also 383. Nor should he make outlay to strengthen the real estate title. *Brackett v. Tillotson*, 4 N. H. 208. See as to administrator who is guardian of the heir, *Foteaux v. Lepage*, 6 Iowa, 123. Nor can he mortgage the decedent's lands. *Black v. Dressell*, 20 Kan. 153; *Smith v. Hutchinson*, 108 Ill. 662; 162 Ill. 232, 44 N. E. 499. Nor rescind executory contract for purchase of land. *Cotham v. Britt*, 10 Heisk. 469. And see 151 N. Y. 204, 45 N. E. 458. But local codes may vary these rules. See c. 2. *post*.

Even admitting that the personal representative may institute proceedings for setting aside a conveyance of land, which the decedent made in fraud of his creditors, this is for the benefit of creditors only; as for heirs, they must institute proceedings in their own interest. *Richards v. Sweetland*, 6 Cush. 324; *Sherman v. Dodge*, 28 Vt. 26; *Ford v. Exempt Fire Co.*, 50 Cal. 299; 220, 252, *supra*. Except by attacking the decedent's own sale during his lifetime as in fraud of creditors, and bringing due proceedings, he cannot contract or sell, even for paying debts, land in which the decedent had no title when he died. 121 N. C. 190, 28 S. E. 264. See 213. And of so little bearing is the fiduciary character of an executor or administrator usually upon the lands of his decedent, that he has been permitted to purchase at any such sale of real estate; except a sale conducted by himself as representative, where, for instance, the personalty was insufficient to pay debts. *Dillinger v. Kelly*, 84 Mo. 561. See next c.

<sup>1</sup> *Supra*, 213, and cases cited; *Taylor Landl. & Ten.* § 390; *Palmer v. Palmer*, 13 Gray, 328; *Kimball v. Sumner*, 62 Me. 309; 173 Ill. 368, 50 N. E. 1095. Such matters, including taxes assessed on the land since the owner's death, insurance, repairs, and improvements, do not belong properly to the accounts of administration. *Lucy v. Lucy*, 55 N. H. 9; *Kimball v. Sumner*, 62 Me. 305; 512 b.

<sup>2</sup> *Supra*, 212; *Griswold v. Chandler*, 5 N. H. 492.

<sup>3</sup> Even though he uses the money as assets to pay debts of the estate. *Conger v. Atwood*, 28 Ohio St. 134, 22 Am. Rep. 362.

directions.<sup>1</sup> But the representative, in order to justify himself in thus managing the decedent's real estate, should bring himself within the provisions of a local statute, or the terms of the will under which he acts, or show consent of the parties interested; which consent may be presumed from their conduct.<sup>2</sup> He must also use due diligence in all such management; and the same general rule as to honor and diligence applies as in the case of personalty.<sup>3</sup>

511. **Concerning a power to sell lands for payment of debts, legacies, etc.,** there are various English decisions.<sup>4</sup> In this country, the sale of lands to pay debts of the decedent whose personalty is found deficient is regulated quite extensively by statutes, in the nature of a probate license to sell.<sup>5</sup> With the real estate, or its title, it is in general admitted that the personal representative has nothing to do, by mere virtue of his office, unless the personal assets prove insufficient for the purposes of his trust; excepting under the special qualifications already set forth, by will, local statute or otherwise.<sup>6</sup> Sales of land in conformity with a will, in order to

<sup>1</sup> Jones's Appeal, 3 Grant, 250. In some American States liberal provision is made by statute for the management of a decedent's real estate by his personal representative, during the settlement of the estate; which course may often be convenient, even though the personal assets be ample for the claims presented. 15 Cal. 259; 66 Cal. 476, 6 P. 130 (power to lease); 118 Cal. 462, 50 P. 701; Kline v. Moulton, 11 Mich. 370; McClead v. Davis, 83 Ind. 263; *supra*, 213, and cases cited; Flood v. Pilgrim, 32 Wis. 377. And as to working plantations, in various Southern States there is similar legislation. 40 Miss. 711, 760; Henderson v. Simmons, 33 Ala. 291, 70 Am. Dec. 590; 51 Ga. 647; Johnson v. Parnell, 60 Ga. 661.

<sup>2</sup> See Billinglea v. Young, 33 Miss. 95; Hendrix v. Hendrix, 65 Ind. 329. As to collection of rents by a special or temporary administrator, see 134, 135, 414. As to power under will, see Watt's Estate, 168 Penn. St. 431, 47 Am. St. Rep. 893, 32 A. 25; 168 Ill. 155, 48 N. E. 311; 101 N. C. 218, 8 S. E. 99, 106. Power to mortgage is sometimes expressly given by will. See Ames v. Holdesbaum, 44 Fed. 224.

<sup>3</sup> Hall's Estate, 70 Vt. 458, 41 A. 508; 96 Cal. 522, 31 P. 584; 111 N. C. 297, 16 S. E. 417; 314, 315, 382; 109 N. W. 710, 132 Iowa, 216.

<sup>4</sup> Notwithstanding doubts formerly entertained, the English chancery has gone so far as to imply a power of sale in executors from a charge of debts, although the estate was devised to others. That rule is made clear by statute 22 & 23 Vict. c. 35. Robinson v. Lowater, 5 De G. M. & G. 272; 21 Beav. 337; 37 Beav. 553. See Sugden Powers, 14th Eng. ed. 662; Lewin Trusts, 340. But such powers of sale are denied to an administrator. Clay, *Re*, 29 W. R. 5. Modern English legislation, nevertheless, renders the lands of a deceased person, not charged with his debts, liable as assets for payment of the same, under the administration of courts of equity; not by way of specifically charging the real assets, but so as to make the heirs or devisees personally liable to the extent of their respective interests, if the personalty proves insufficient. See statutes cited in Wms. Exrs. 1688-1692; 1 Mac. & G. 456; 22 Beav. 21; Richardson v. Horton, 7 Beav. 112; Dyson, *Re*, (1896) 2 Ch. 720.

<sup>5</sup> See next chapter.

<sup>6</sup> See *supra*, 213; 5 Whart. 228, 350. Any surplus arising from such a sale, though commonly distributable as personalty, should be considered as impressed by the testator's intent in case of a devise. 181 Penn. St. 551, 37 A. 576. In general, chancery has no inherent jurisdiction in such matters, except for enforcing some specific lien or right in the land. Wms. Exrs. 650; *supra*, 212, and cases cited. Vendor's lien

provide legacies, where there is a deficiency in personal assets, are, however, permitted both in English and American chancery; the presumption being that a testator intends the legacies given by his will to be a charge on his residuary real as well as his personal estate.<sup>1</sup>

512. **Marshalling assets and the exoneration of real estate by the personal** are important doctrines of equity jurisprudence in administering estates; the rule being in full conformity with general policy, that wherever the intention of a testator does not clearly conflict with such an interpretation, real estate shall be applied to debts, legacies, and charges, only so far as personal assets, the primary fund, prove insufficient, notwithstanding mere directions in the will to sell or mortgage for such purposes.<sup>2</sup> Marshalling the assets in favor of creditors and legatees is the chancery method of causing the whole property, real and personal, of a decedent to be so applied among claimants that all equities shall be preserved according to due order.<sup>3</sup>

not an asset thus available. 44 S. W. 485, 91 Tex. 488. Out of the surplus from a sale the representative may fully reimburse himself before distributing to residuary parties. Bolton, *Re*, 146 N. Y. 257, 48 Am. St. Rep. 796, 40 N. E. 737; 43 So. 228, 150 Ala. 532.

<sup>1</sup> Greville v. Browne, 7 H. L. Cas. 689; Bench v. Biles, 4 Madd. 187; Poulson v. Johnson, 2 Stew. 529; Corwine v. Corwine, 24 N. J. Eq. 579; 31 N. J. Eq. 427. The right apart from statute is denied in 4 Del. Ch. 9. See Gibbens v. Curtis, 8 Gray, 392 (local statute). Where the will gives to executors a power to sell the land in case of a deficiency of assets, they should sell under the power and not under the statute. 5 Dem. (N. Y.) 14, 251; Twitty v. Lovelace, 97 N. C. 54, 2 S. E. 661. And see 515.

They who purchase land of a decedent from his heirs or legatees, before the full administration and settlement of the estate, take the incumbrance of a possible sale for payment of debts, etc., and the expenses of administration, unless otherwise secured. Flood v. Strong, 108 Mich. 561, 66 N. W. 473; 514 *post*. See as to equity powers to authorize a conversion, Johnson v. Buck, 77 N. E. 163, 220 Ill. 226.

<sup>2</sup> Walker v. Hardwicke, 1 My. & K. 396; 1 Sim. 84; Van Vechten v. Keator, 63 N. Y. 52; 115 N. C. 366, 20 S. E. 520 (general or specific debts); Wms. Exrs. 1705. As this rule, after all, is subject to proper expressions of testamentary intention, numerous subtle refinements are found in the decisions which interpret this intention. See Wms. Exrs. 1694-1712, and Perkins's notes, where this question is examined at length.

American cases admit the general maxims of exoneration; and hence the rule, supported by numerous American, as well as English, equity decisions, that debts contracted by a testator, although secured by mortgage, are to be paid presumably out of his personal property to the exoneration of his real estate. *Supra*, 430; Sutherland v. Harrison, 86 Ill. 363; 11 Allen, 140; Towle v. Swasey, 106 Mass. 100; McLenahan v. McLenahan, 3 C. E. Green, 101; Howel v. Price, 1 P. Wms. 292; Wms. Exrs. 1694-1697, and cases cited. Even as to personal assets from a foreign jurisdiction. See 90 Tex. 245, 38 S. W. 350. But this is an equitable doctrine with many reservations, and the late English stats. 17 & 18 Vict. c. 113, and 30 & 31 Vict. c. 69, pronounce against such a rule of interpretation. The New York statutes likewise discountenance such presumptions; and, in that State, a mortgage debt is primarily charged upon the real estate mortgaged, unless a will clearly directs otherwise; which seems the fairer doctrine on this subject. Waldron v. Waldron, 4 Bradf. Sur. 114; Van Vechten v. Keator, 63 N. Y. 52.

<sup>3</sup> See Wms. Exrs. 1713-1720, and numerous cases cited; 1 Story Eq. Jur. § 558 *et seq*. In the United States, generally, by statute, all the property of the deceased, real and

512a. **Concerning a representative's dealings with mortgages** on his decedent's real estate, the rule is, that if the deceased was not liable personally to the mortgagee or other lienholder for the debt secured upon the land, his personal property cannot be applied to its satisfaction; he holds the land subject to the lien, but is not liable himself, nor is his estate other than the land liable for the debt. But it is otherwise where the decedent contracted the mortgage debt or actually assumed an incumbrance already existing.<sup>1</sup>

512b. **Special charges and allowances, or a higher rate of commissions to the fiduciary than is usual in administration, may be justified in appropriate dealings with his decedent's real estate.**<sup>2</sup>

personal, is, in equity, to be applied as follows, when no statute or express will prescribes a different order of application, exhausting all the assets of each class before proceeding to the next: (1) The general personal estate. (2) Real estate specially devised for the payment of debts. (3) Real estate descended. (4) Real estate devised, though charged. 4 Kent Com. 421. And see *supra*, 490; 2 Jarm. Wills, 588-590; Wms. Exrs. 1693, Perkins's note. While creditors are not confined to this general order, legal representatives, heirs, legatees, and devisees have rights for relief against each other in case the true order is disarranged. Perry Trusts, § 566.

<sup>1</sup> *Minter v. Burnett*, 90 Tex. 245, 248, 38 S. W. 350, and cases cited. This rule, however, is subject to exceptions founded in covenant or testamentary intention. As to acquiring lands under a foreclosure, or by taking under a conveyance to save expense of foreclosure, see *Barclay v. Cooper*, 42 N. J. Eq. 516, 9 A. 107. And see *supra*, 214, 512.

<sup>2</sup> See Part VII, c. 2. He may thus be allowed for a salary paid a collecting agent, or for a broker's fee in procuring a sale. *Dey v. Codman*, 39 N. J. Eq. 258. And see *Stone v. Strong*, 42 Ohio St. 53; 121 Cal. 609, 54 P. 97. For taxes, water rates, repairs, or insurance, reimbursement may be claimed upon the principles already discussed. See *supra*, 212, 213, 428; 146 N. Y. 257, 48 Am. St. Rep. 796, 40 N. E. 737. Taxes and water rates chargeable on land before an owner's death may well be paid by his executor or administrator, but not those usually which are charged after his death *Supra*, 428, and cases cited in notes; *Lucy v. Lucy*, 55 N. H. 9; *Kimball v. Sumner*, 62 Me. 305. So as to insurance *Ib.*

## CHAPTER II.

## STATUTE SALES OR MORTGAGES UNDER JUDICIAL LICENSE.

513. There are various modern enactments, of strictly local application, by virtue of which executors and administrators, like other fiduciaries, may be judicially licensed to sell real estate in special cases, where the welfare of interested parties requires it, and they have no adequate authority otherwise.<sup>1</sup> In American practice the probate court is usually invested with an appropriate statute jurisdiction; for such relief the executor or administrator presents his petition for a license, representing the facts essential to the case; and the license being granted, its terms must be strictly pursued. In the execution of a statute power like this, the terms of the legislative grant, with its limitations, should, like the power conferred by a testator under his will, be carefully observed by the court which issues the license, and by the representative who sells under it.<sup>2</sup> And if the statute made can be pursued with advantage for such purposes, equity should take no jurisdiction of the case, nor interfere with the sale made in proper pursuance of the license.<sup>3</sup>

514. A local license is restricted to such land as may be needful, under the usual expression; though local statutes provide sometimes that, where, by a partial sale of land, the residue or some specific part would be greatly injured, the court may license a sale of all or of such part as may appear to be most for the interest of all concerned.<sup>4</sup> Nor are the rights of heirs and devisees to

<sup>1</sup> In the present instance the usual object of a license is, in the course of administration, to pay debts and legacies, where the personal estate of the deceased person proves insufficient for such purposes, including the reasonable costs and expenses of settling the estate. See 40 N. J. Eq. 173; 53 A. 116, 96 Me. 570; 94 N. W. 679, 89 Minn. 253. And see 195 Penn. St. 225. Recent statutes, however, authorize sales and mortgages by license of a court for other purposes, as, for instance, to discharge contingent interests in an estate. Or to sell or release a cemetery lot. Or where the power under a will was dependent upon the consent of a person since deceased. Or, under certain circumstances, where there are no known heirs. Provision is also made as to sales by foreign representatives. See local code. But as to mere administration expenses or a debt due the administrator, cf. 39 So. 379, 143 Ala. 652; 85 S. W. 239, 74 Ark. 168.

<sup>2</sup> 67 Conn. 1; 63 Conn. 332; 44 N. W. 318, 78 Mich. 186.

<sup>3</sup> 15 Fed. R. 307; Johnson v. Holliday, 68 Ga. 81.

<sup>4</sup> Local code; 90 N. C. 551. The orphans' court, as such statutes usually run, cannot order to be sold for debts an equitable interest of the decedent in land under a contract of sale. Hendrickson v. Hendrickson, 41 N. J. Eq. 376, 4 A. 665. As to land fraudulently conveyed, see 66 N. E. 23, 182 Mass. 534; 69 S. W. 317, 169 Mo. 130.

be ignored; but they should have due notice of the petition, and opportunity to avert the necessity of a sale; as, perhaps, by giving security or making up the deficiency themselves.<sup>1</sup> Until the will is proved or letters of administration are granted, the court is without jurisdiction to order a sale of land in aid of assets.<sup>2</sup> But after this jurisdiction attaches, application should be made for license to sell within a reasonable time after the condition of the estate can be ascertained; nor should the court delay its permission to sell, upon any hypothetical regard for personal assets which are practically unavailable for an adjustment as promptly as creditors of an estate have usually the right to expect.<sup>3</sup> Heirs and devisees cannot prevent a license from issuing in a suitable case.<sup>4</sup>

515. **Our local statutes provide in detail the method of procuring a license to sell, and of acting under it.**<sup>5</sup> Any surplus proceeds

<sup>1</sup> By our legislative policy, real estate descends to heirs, or goes to devisees, subject to administration and the due settlement of debts and legacies, and this liability continues against not only such parties but purchasers from them, until the administration is closed. See 511; *State v. Probate Court*, 25 Minn. 22.

Whether a surviving spouse's interest in the decedent's real estate can thus be sold, see 107 Ind. 121, 8 N. E. 71. A mere reversionary interest in expectancy cannot be, unless statute specifies. 127 Ind. 332, 26 N. E. 823. See *Smith v. Wells*, 134 Mass. 11 (after a residuary legatee's death who was also executor). But an executor and residuary legatee who has given bond to pay debts and legacies cannot be licensed to sell land. 133 Mass. 447; 138. A sale or mortgage by heirs or devisees, before administration has proceeded far enough to settle or bar out claims, leaves the land meanwhile with a sort of cloud upon the title; but after administration has been fairly completed, such sale or mortgage would be practically clear of the incumbrance. An administrator cannot sell the land of his intestate while it is held adversely by another, without proceedings for possession. 68 Ga. 81. And see 67 Ala. 173; 51 Mich. 360, 16 N. W. 685. Where there exist lawful claims and insufficient personal assets to meet them, it is the duty of the representative to apply for a license, and of the court to grant it. There may be a sale at the instance of an administrator *de bonis non*. 83 Ind. 411; 59 Tex. 172. Or perhaps of the creditors. See 108 Mich. 561, 66 N. W. 473.

<sup>2</sup> *Whitesides v. Barber*, 24 S. C. 373.

<sup>3</sup> Petition for a license denied where the creditors had been culpably negligent in applying for the appointment of an administrator. 63 N. H. 29. And see as to long delay justifying an injunction against the sale, 86 Mo. 253. See also 60 Conn. 63, as to wasted personality. 59 N. E. 586, 189 Ill. 144; 79 N. E. 629, 115 Am. St. Rep. 155, 224 Ill. 238 (laches).

<sup>4</sup> 75 Ala. 335.

<sup>5</sup> American statutes have usually the following points in common: (1) an application to the court, upon which the license is granted; (2) a special bond covering such proceeds of the sale as may be realized; (3) the formal sale of the land, usually at public auction; (4) the execution of a deed with proper recitals to the purchasers, covenanting that the representative's sale has been legal and upon due authority; (5) a proper application of the proceeds arising from the sale. As to purchase by the fiduciary himself, see *Marshall v. Carson*, 38 N. J. Eq. 250; 80 N. E. 1056, 226 Ill. 550 (voidable only); 105 S. W. 891, 32 Ky. Law, 314. See local codes and decisions; *Wms. Exrs.* 650, and *Perkins's notes*. A sale may be adjourned like other such sales. 41 N. J. Eq. 515. But if the representative unreasonably delays availing himself of his license, recourse should be had to the court which issued the license. 105 Penn. St. 315. Confirmation refused by the court where the price was grossly inadequate though the sale was fairly conducted in other respects. 80 Va. 695. Some codes require such judicial confirmation, others do not. See 89 P. 666, 75 Kan. 391.

which may remain, after satisfying the purposes of the sale, belong to the heirs or devisees, as though impressed with the original character of the property. As to the essentials of a purchaser's title, the terms of the statute must furnish the guide; and while merely incidental irregularities may be cured by the completion or confirmation of the sale, there must have been jurisdiction in the court, and a substantial compliance with the fundamental requirements of the statute, both in granting the license and in pursuing it.<sup>1</sup>

**516. License to mortgage decedent's real estate is sometimes given in connection with the payment of debts, legacies, and**

The doctrine of *caveat emptor* applies to such sales, and the purchaser cannot renounce his bid or repudiate and get back his purchase-money, because of defective title, in the absence of any fraud or a positive warranty by the executor or administrator. *Tilley v. Bridges*, 105 Ill. 336; *Jones v. Warnock*, 67 Ga. 484; 67 Ala. 508; *Twitty v. Lovelace*, 97 N. C. 54 (sale by executor under a power in the will); 58 S. E. 1037, 125 Ga. 123. And see *supra*, 361. Or even, as it is held, where the fiduciary fraudulently asserted that there was no incumbrance. *Riley v. Kepler*, 94 Ind. 308. One buys subject to any outstanding agreement between decedent and a third party, which complies with the formalities of law. *Shup v. Calvert*, 174 Ill. 500, 51 N. E. 828.

The purchaser's title, as against heir or devisee, dates from the sale or the court's confirmation of the sale, or the execution of the conveyance, according to the intention of the local statute. In some States the fiduciary executes his own conveyance, conformably to the terms of sale; in other States, the conveyance is executed by order of the court upon a confirmation.

<sup>1</sup> Local decisions in construction of local statutes will afford to the practitioner the true rules of guidance. The main question is one of statute interpretation: as to what provisions in fact shall be regarded as imperative, and what as merely directory. The disposition is to regard an infirm sale as voidable at the election of those injured by it, rather than to pronounce it utterly null and void, where there was jurisdiction and all statute provisions plainly imperative were followed. But as to instances of a void sale, see *Allen v. Kellam*, 69 Ala. 442; 160, *supra*; 99 Mich. 590, 58 N. W. 636; 110 Cal. 579, 52 Am. St. Rep. 116, 42 P. 1063. On the question of confirmation of the sale only those questions which the statute treats as material can be considered by the court.

The representative warrants nothing in the title of the land; nor is it for him to remove incumbrances. *Supra*, 212; *LeMoyne v. Quimby*, 70 Ill. 399; *Ives v. Ashley*, 97 Mass. 198. And even should he thus covenant he will not bind the estate but himself. *Hale v. Marquette*, 69 Iowa, 377, 28 N. W. 647. Where an administrator sold land without leave of court and applied the purchase-money to the payment of debts, the purchaser was subrogated to the rights of the creditors who had been thus paid, but no further lien was allowed him. *Duncan v. Gainey*, 108 Ind. 579, 58 Am. Rep. 71, 9 N. E. 470.

After long lapse of time from the sale under a license, every reasonable intentment will be resorted to, to uphold the regularity of the proceedings. *Starr v. Brewer*, 58 Vt. 24, 3 A. 479. An action to set aside such a sale as fraudulent and void and to compel the fiduciary to perform a trust charged on the land is a matter of equity jurisdiction. *Caldwell v. Caldwell*, 45 Ohio St. 512, 15 N. E. 297. Formal defects cured by retrospective legislation. 66 Iowa, 552, 24 N. W. 50. See further, 42 Ohio St. 53. As to the adjustment of assessed taxes, see *Fessenden's Appeal*, 77 Me. 98.

As to ancillary administration sale, see *Lawrence's Appeal*, 49 Conn. 411. An executor before selling ought to make sure that he has complied with the *lex rei sitæ* as to probate of the will. 60 Tex. 353.

Sometimes a representative who pays debts of the estate, may fairly be subrogated to the rights of the creditors, and have land sold for his reimbursement. *Denton v. Tyson*, 118 N. C. 542, 24 S. E. 116. But a sale of land for the payment of debts whose lien under the local statute has expired, is a nullity. 178 Penn. St. 245, 56 Am. St. Rep. 760, 35 A. 1047, 36 L. R. A. 834.

charges, or for other stated purposes.<sup>1</sup> But the local statute should be explicit, for the right to sell does not imply the right to mortgage the realty;<sup>2</sup> nor upon an application for a license to sell should a license to mortgage be granted.<sup>3</sup>

517. **In some States, lands may be subjected to the payment of claims against the estate, by levying thereon an execution obtained against the personal representative.**<sup>4</sup>

<sup>1</sup> See local code.

<sup>2</sup> See 114 Penn. St. 618, 8 A. 2; 162 Ill. 232, 44 N. E. 499; *Allen v. Ruddell*, 51 S. C. 366, 29 S. E. 198. And see as to selling and conveying an equity of redemption in lands, *Bradley v. Simonds*, 61 N. H. 369; 67 Ala. 508.

<sup>3</sup> 145 Ind. 281, 44 N. E. 467. If an executor has authority to mortgage real estate under an express power contained in the will, he may execute a mortgage in conformity, without procuring an order from the court; and the lien of such a mortgage will be beneficially upheld. *Iowa Co. v. Holdenbaum*, 86 Iowa, 1, 52 N. W. 550.

<sup>4</sup> 4 Allen, 417; 5 Watts, 367; 14 Me. 320. But that course is not universally permitted in this country. See 16 Ill. 318; *Wms. Exrs.* 651, Perkins's note.



## PART VII.

## ACCOUNTING AND ALLOWANCES.

## CHAPTER I.

## ACCOUNTS OF EXECUTORS AND ADMINISTRATORS.

518. **An executor or administrator is bound to keep accounts of his management** of the estate committed to him, like any trustee, which accounts, clear, distinct and accurate, ought in some way to be open to the inspection of persons interested in the estate.<sup>1</sup> Upon the analogies of trusteeship, English courts of equity long exercised a jurisdiction over such matters, while the powers of spiritual tribunals appeared inadequate either for compelling the personal representative to administer the estate or to disclose the course of his dealings with it. Among the various functions of chancery, therefore, has been that of entertaining a bill of discovery against the personal representative, and forcing him to set forth an account of the assets and the manner in which he has applied them.<sup>2</sup>

519. **What was known as a creditor's bill** characterized such proceedings. One or more creditors of the estate would file a bill in chancery on behalf of themselves and all others who might be brought in under the decree, with the intent of preventing any undue preferences by the executor or administrator in the payment of claims, and causing all the assets to be brought in and appropriated in a due course of settlement.<sup>3</sup> The natural tendency of

<sup>1</sup> *Freeman v. Fairlee*, 3 Mer. 43; *Perry Trusts*, § 821; *Rhett v. Mason*, 18 Gratt. 541.

<sup>2</sup> *Howard v. Howard*, 1 Vern. 134; *Brooks v. Oliver*, Ambl. 406; *Wms. Exrs.* 2005, 2006; *Story Eq. Jur.* § 534. Upon the admitted justice and policy of such coercion, and the confessed inadequacy of all other tribunals to apply it, the lord chancellors firmly rested their authority. Nor did they defer to the ordinary himself in these proceedings; for a bill might be brought in chancery, for the discovery of assets, before a will had been proved in the spiritual courts, and, indeed, while probate litigation was pending; they did not deem it needful to wait until an executor had received his letters testamentary, provided a trust of some sort could be alleged and proved against him; and even though an administrator's accounts had been passed and distribution ordered in the ecclesiastical forum, chancery might at discretion re-investigate and direct an accounting *de novo*. 2 Vern. 47, 49; *Phipps v. Steward*, 1 Atk. 285; 2 Chanc. Cas. 198. Some wilful neglect or default with respect to assets was usually, however, to be alleged and shown, as the ground of invoking chancery remedies in cases of this kind. *Wms. Exrs.* 2006, note; *Coope v. Carter*, 2 De G. M. & G. 292.

<sup>3</sup> See *supra*, 437. If assets were admitted by the representative, and the petitioner's debt proved, immediate payment therefor was ordered; otherwise, a general account of the estate, and all debts and claims upon it, was taken against the executor or ad-

this costly and prolonged contention must have been to make practical waste of the assets, while theoretically assuming to save them; to bury the better part of an estate in a wholesale litigation, lest some one should be preferred. Under English enactments, during the reign of Victoria, some of the most serious objections to these prolix proceedings have been removed.<sup>1</sup>

520. While in the United States creditors' bills are sometimes brought,<sup>2</sup> modern probate practice, as extended by local legislation, affords, usually, all the facilities now needful for compelling a duly qualified personal representative to account for his management of the estate confided to him; and that by a process compara-

ministrator, and an appropriation of the fund directed accordingly. *Woodgate v. Field*, 2 Hare, 211; *Wms. Exrs.* 2007; 1 Russ. & My. 347. As one creditor might thus institute proceedings which would bring in all the other creditors besides, so one or more legatees or distributees might, on behalf of themselves and all other similarly concerned, invoke the aid of chancery with corresponding effect. *Ib.* And yet, complicated and costly as might be the process for working out such results, none were conclusively bound by the final decree who had not been brought within the scope of the suit; and absent creditors, legatees, or distributees, who had been guilty of no laches in failing to respond and becoming parties to the bill in equity, might afterwards assert their claims, not, indeed, against the executor or administrator himself, but for contribution from the creditors, legatees, or distributees, who had obtained at much cost what they had supposed their own. *David v. Frowd*, 1 My. & K. 200; *Wms. Exrs.* 1450, 2008. Cf. *Clowes v. Hilliard*, 25 W. R. 224.

<sup>1</sup> *Stats.* 15 & 16 Vict. c. 86; 22 & 23 Vict. c. 35; 2 Hare, 213; *Wms. Exrs.* 2008 *et seq.* And see *Nayler v. Blount*, 27 W. R. 865; *Laming v. Gee*, 27 W. R. 227; *Wollaston v. Wollaston*, L. R. 7 Ch. D. 58. Nevertheless, the English equity courts are still much exercised with creditors' bills and suits for administration. *Wms. Exrs.* 2008 *et seq.*, with numerous citations. And as to co-executors, see L. R. 10 Ch. 464. As incidental thereto, the taxation of costs appears to be an absorbing cause of dispute. See, e.g. among such recently reported English cases, L. R. 10 Ch. D. 468; L. R. 7 Ch. D. 33, 176; L. R. 11 Ch. D. 440; *Moore v. Dixon*, L. R. 15 Ch. D. 566. And, after all, though one may get his debt or legacy finally paid, he cannot readily obtain an inspection of the administration accounts.

<sup>2</sup> More especially in States where probate jurisdiction is limited and equity takes a wide range. *Colbert v. Daniel*, 32 Ala. 314; *Cram v. Green*, 6 Ohio, 429; 2 Hayw. 163; *Wright v. Lowe*, 2 Murph. 354; *Rogers v. King*, 8 Paige, 210. This jurisdiction appears to be reluctantly taken in most States, if taken at all. Thus, an executor, who was also an agent or trustee of the decedent during his life, cannot, after the final settlement of his accounts in the orphans' court, be called upon to account separately as a trustee in equity. *Vanmeter v. Jones*, 3 N. J. Eq. 520. And see 66 A. 946 (N. J. Ch. 1901) (interference only for fraud or mistake before such court); 103 N. Y. S. 410; 105 N. Y. S. 223. An executor *pro forma* need only account for the surplus remaining after paying debts. 2 Har. & J. 191. Order for an account has, in some cases, been declined after a long interval. 8 Ired. Eq. 141. Or where it was not alleged that insufficient security had been given by the representative. 2 P. & H. 225. See *Garrett v. Stilwell*, 10 N. J. Eq. 313. Stale demands are not to be reopened. 35 Ark. 137. But a bill filed by one who was no party to a final settlement in the probate court may treat it as null, and invoke a court of equity to compel a full account. 5 Cal. 58, 63 Am. Dec. 82. Legatees and next of kin should not be joined as parties. 53 Md. 550. And a creditor cannot bring a bill to have an account taken for his own benefit, apart from other creditors. 2 N. J. Eq. 133. See 5 Rand, 195; 3 Sm. & M. 329; 1 Sandf. Ch. 399; 3 Johns. Ch. 578; *Garvin v. Stewart*, 59 Ill. 229; *Peters v. Rhodes*, 47 So. 183, 157 Ala. 25 (resort to equity, after a probate accounting, to enforce a trust where probate court cannot).

tively inexpensive and simple, founded upon the duty he owes under his bond. As we shall presently show, in detail, the probate court, which controls the appointment and removal in the first instance, has become, in most of the United States, the competent and convenient primary forum for his accounting; an appeal, of course, lying to the supreme probate and equity tribunal of the State, as from other probate decrees. The American rule of the present day is, therefore, with few exceptions, that the court of chancery, usually, has neither jurisdiction nor occasion to interfere in the settlement of the estate, and to order an accounting by an executor or administrator.<sup>1</sup> And, even as to one who has resigned or been discharged from his trust, our law inclines to treat him as one whose accounts should be closed under probate direction, as in the case of one who has died in office.<sup>2</sup>

<sup>1</sup> *Jones v. Irwin*, 23 Miss. 361; *Morgan v. Rotch*, 97 Mass. 396; *Walker v. Chieever*, 35 N. H. 345; *Adams v. Adams*, 22 Vt. 50; *Wms. Exrs.* 2006, note by Perkins. Cf. 10 N. J. L. 287. Though, as to matters growing out of the account, such as adjusting rights between the representative and the estate, or enforcing trusts, it may be otherwise if the probate court is not competent. *Adams v. Adams*, *supra*.

In the United States as well as in England, the common-law courts have no immediate cognizance of the accounts of executors and administrators, and cannot compel a performance of the duty; this being a branch of probate or equity jurisdiction. *Wms. Exrs.* 786, 1931, Perkins's note; 1 Nott & M. (S. C.) 587.

<sup>2</sup> Cf. *Gould v. Hayes*, 19 Ala. 438; 8 Sm. & M. 214; 33 Miss. 560. And see 81 N. Y. 573. See also, as to the bill for an accounting from one's predecessor, *Stallworth v. Farnham*, 64 Ala. 259, 345. And see, as to administrators *de bonis non*, *supra*, 408.

In a few American States, however, where chancery jurisdiction is plenary, equity and probate courts appear to exercise a sort of concurrent jurisdiction as to the accounts of executors and administrators. *Ewing v. Moses*, 50 Ga. 264; *Marsh v. Richardson*, 49 Ala. 431; *Sanderson v. Sanderson*, 17 Fla. 820, cases, *supra*. As to settling two estates under the same administrator, see 56 Ala. 486. As to appellate powers, or those of review in chancery, where the probate tribunal has acted, see further, 530, *post*. And where it becomes necessary to apply to a court of equity, as, for instance, should the personal representative himself ask for necessary instructions as to the final distribution under a will, that court, sometimes—having all parties before it, by means of personal or substituted service—proceeds to the settlement of the representative's accounts and a final distribution. Convenience may sometimes dictate such a course; besides which, the assumption of authority by so august a tribunal may not, in practice, be readily disputed. *Daboll v. Field*, 9 R. I. 266, cases, *supra*; *Wms. Exrs.* 2006, and note. See *Buie v. Pollock*, 55 Miss. 309; *Kent v. Cloyd*, 30 Gratt. 555; *Dulany v. Smith*, 97 Va. 130, 33 S. E. 533 (collusion in a fraudulent misappropriation).

The original and inherent jurisdiction of equity, in a State, we may add, over an executor's or administrator's accounts, is not to be taken away by mere implication, whenever a legislature clothes the probate tribunals with competent powers; nor, even at this day, is a local probate authority usually found adequate for adjusting all the questions which may arise in the course of settling estates, still less for exercising exclusive jurisdiction in such matters. And yet the American tendency is, and ought to be, to favor pre-eminently the probate tribunals as those of primary functions, for dealing with the accounts of executors and administrators, and keeping the records of settlement, and regulating details after its own simple system; while chancery refrains from disturbing these methods, unless a special complication renders its intervention desirable, and, on the whole, discourages costly and burdensome proceedings out of course by creditors' bill or otherwise, to the needless shrinkage of the assets;

521. As for English jurisdiction over the accounting of executors and administrators, we have seen, that, as to security from executors, neither the spiritual nor the probate court has, in England, been vested with competent powers; but, that courts of chancery rather have exercised whatever plenary authority was available;<sup>1</sup> also that administrator's bonds do not enforce the duty of a probate accounting very strenuously.<sup>2</sup> One may readily infer, therefore, that jurisdiction over the accounting of executors and administrators, as exerted by the English probate or ecclesiastical tribunals, is, in character, quite secondary to that of chancery.<sup>3</sup> As the new English court of probate is invested with much the same authority as the spiritual courts formerly exercised in such matters, but under nominal restrictions even greater as to affording practical

all parties aggrieved having ample opportunity for redress by taking a direct appeal from the probate decree.

A court of chancery will rarely interfere, where the probate tribunal has already taken cognizance, and is competent to adjust the account. *Seymour v. Seymour*, 4 Johns. 409. Provision exists, in some States, for removing the settlement of an estate from the probate to the chancery court, in certain cases. *Marsh v. Richardson*, 49 Ala. 431. See 65 Ala. 16.

<sup>1</sup> *Supra*, 137; Wms. Exrs. 237.

<sup>2</sup> Acts 21 Hen. VIII, c. 5; 22 & 23 Car. II, c. 10; 20 & 21 Vict. c. 77; Wms. Exrs. 529-533; *supra*, 139.

<sup>3</sup> It is said, that neither an executor nor administrator can be cited by a probate tribunal *ex officio* to account after he has exhibited an inventory, but it must be at the instance of an interested party. But those interested, and those with even the appearance of an interest, may require an inventory to be produced. Wms. Exrs. 2057; 1 Salk. 315, 316; 3 Atk. 253, by Lord Hardwicke; *Wainford v. Barker*, 1 Ld. Raym. 232. Whether this should be equally true of proceedings for account or not, it is clear, that, at the instance of a legatee, or next of kin, or creditor, the representative was compelled to account before the ordinary, while the probate tribunal was an ecclesiastical one. But, while a creditor might, by this course, gain an insight into the condition of the assets, in aid of proceedings in the common-law court to enforce his rights, probate tribunals had no authority to award payment of his debt; and hence, the bill in equity, praying for a discovery of assets and administration, was more commonly brought. *Supra*, 519; Wms. Exrs. 2058, 2061; Toller, 495; Burn Eccl. Law, 487. Legatees and distributees were better off; for legacies and distributive shares might formerly be sued for in the ecclesiastical forum; and, indeed, it was by a sort of invasion of the spiritual jurisdiction that English chancery courts first began to take cognizance of such rights; but the exclusiveness of chancery authority in this latter respect, as finally conceded by the English parliament, plainly indicates how inadequate must have been the relief which an ecclesiastical forum in that country was ever competent to afford. *Deeks v. Strutt*, 5 T. R. 692. It was Lord Nottingham who first extended the system of equitable relief to legatees. Wms. Exrs. 2061. As to various matters of ecclesiastical or probate procedure, ending usually with the exhibition of an inventory and perhaps an account also, under oath, see 4 Burn Eccl. Law, 488; Wms. Exrs. 2060; 2 Add. 330.

It might happen that, while one creditor resorted thus to the probate tribunal, another would invoke the ampler relief afforded by chancery. 2 Cas. temp. Lee, 561. But chancery judges would not permit creditors, legatees, or next of kin to use the process of the spiritual courts in aid of an administration suit; and wherever one who had brought his bill in chancery prayed for an inventory under a probate citation, he was compelled to make his choice which tribunal to proceed in. 2 Cas. temp. Lee, 31, 134, 268; Wms. Exrs. 2061.

relief to those entitled to ask for an account, the supremacy of the English chancery, in litigation which relates to the discovery and administration of assets, inclusive of settling legacies and a distribution, appears to have become more firmly established than ever.<sup>1</sup> That returning either inventory or account to a probate tribunal has become a matter of indifference, appears conceded by the very form of the bond now prescribed by the English probate court;<sup>2</sup> it is a virtual assent that courts of equity shall direct and supervise the practical administration and settlement of contentious estates, and that non-contentious business may be privately adjusted.

522. But in our several States, the primary and usual forum of accounting is the local probate court, whence the executor or administrator received his credentials. To this tribunal, by the American system, regular accounts should be returned by the personal representative, as well as his inventory. The bond, which neither testacy nor intestacy exempts one from furnishing, obliges the representative to return an account to the probate court, not upon request, but within stated and regular periods, until the administration is closed; and to this condition the sureties of the representative, if there be such, stand likewise bound.<sup>3</sup> The system of probate accounting is simple, exact, and, except in contentious business, attended with little cost. The probate accounts of each deceased person's estate become matter of public record. And, while the parties interested may, perhaps, be suffered to close up an estate privately, provided all entitled to the surplus are favorable, and all creditors' claims and legacies are settled, together with charges, the failure to render one's probate account is, nevertheless, a breach of the bond, and any dissatisfied party in interest may avail himself of it.<sup>4</sup> Under such conditions it is

<sup>1</sup> See stat. 20 & 21 Vict. c. 77; Wms. Exrs. 290, 292, 2062. Under the statute this new court can entertain no suits for legacies nor for the distribution of a residue.

<sup>2</sup> *Supra*, 137-139; Wms. Exrs. 533. The condition of bond (less strict than that formerly stated) is that the principal shall make and exhibit an inventory and render an account of administration "*whenever required by law so to do.*" *Ib.* We have seen that, even with the old form of bond, the practice of returning an inventory had fallen into disuse in that country. *Supra*, 229.

<sup>3</sup> *Supra*, 140. Such is the usual tenor of legislation in American States.

<sup>4</sup> *McKim v. Harwood*, 129 Mass. 75. An agreement to waive inventory and account is revocable. 170 Mass. 506, 49 N. E. 916. A private arrangement between some of the distributees does not discharge the administrator as against any one who was not a party to the agreement; nor as against a deceased party in interest whose own representative did not enter into it. *Smilie v. Siler*, 35 Ala. 88. And distributees may generally, at election, hold the administrator to a strict statutory accounting. *Stewart v. Stewart*, 31 Ala. 207. Even if the assets were all used in preferred charges, one is

unlikely that an estate will be settled out of court without affording to all concerned a fair opportunity of inspecting the administration accounts, unless, at all events, their respective claims are fully and promptly settled.

523. A citation directing next of kin, creditors, legatees, and all other persons interested in the estate, to appear before the probate

accountable. *Griffin v. Simpson*, 11 Ire. 126. Liability to account to a legatee or distributee is not discharged by a written receipt of a nominal sum in full of all demands. *Harris v. Ely*, 25 N. Y. 138; *Bard v. Wood*, 3 Met. 74; *Clark v. Clay*, 11 Post. 393. If the representative claims that the petitioner for an account has released him, the surrogate may pass upon the question of the validity of such release. 41 Hun, 95; 4 Dem. 366.

Next of kin and residuaries may petition to compel an account. *Hobbs v. Craige*, 1 Ired. L. 332. So may a creditor or legatee. *Harris v. Ely*, 25 N. Y. 138; 14 Barb. 376. But see *Freeman v. Rhodes*, 3 Sm. & M. 329. Trustees under a testamentary trust can compel, but not the *cestui que trust*. *Attwill v. Dole*, 67 A. 403, 74 N. H. 300. Concerning devisees, see 4 Desau. 330. And as to a *cestui que trust* or infant, whose trustee or guardian is one of the executors, see 1 Sandf. Ch. 399. The representative is bound to account upon the application of any one interested in the estate, and if the applicant has no interest, that is a sufficient defence before the probate tribunal. *Becker v. Hager*, 8 How. (N. Y.) Pr. 68. But relief by injunction is not to be granted on this ground. *Ib.* See *Okeson's Appeal*, 2 Grant (Pa.) 303.

Delay in settling accounts is leniently regarded by some American courts where no fraud or misconduct has intervened. *Jones v. Williams*, 2 Call. 102. But correct accounts should have been kept and exhibited to any interested party desiring to see them. *Rhett v. Mason*, 18 Gratt. 541. And see 44 Ark. 509 (periodical accounts required). As to the duty of probate accounting, notwithstanding a pending chancery suit, see *Jones v. Jones*, 41 Md. 354. Breach of the bond, how cured before suit brought on it. *McKim v. Harwood*, 129 Mass. 75.

A sheriff or *ex officio* administrator may be cited in to account. *McLaughlin v. Nelms*, 9 Ala. 925. As to accounting by the representative of a deceased representative, see *Schenck v. Schenck*, 3 N. J. L. 562; *supra*, 408. See, in general, *Sellers v. Sellers*, 35 Ala. 235; *Hillman v. Stephens*, 16 N. Y. 278; *Whiteside v. Whiteside*, 20 Penn. St. 473.

A settlement out of court is not presumed to intend dispensing with accounting; and, even if it did, not to account is a breach of the conditions annexed to the appointment. Not only are representatives liable to suit on their official bond if, on being cited in, they neglect to render accounts of administration, but, under some American codes, they may be indicted for delinquency in this respect. See 4 Humph. 285; 54 Ga. 180. And see as to contumacy, 14 La. Ann. 779. Or compelled to pay a fine. 13 La. Ann. 585. And one may be removed from his trust for failing to account correctly on citation. See, *supra*, 154. But cf. *Monroe v. Mather-Lovelace*, 82 N. E. 1129, 189 N. Y. 563 (bound by fair private accounting and settlement assented to). Any one showing a *prima facie* right under the statute may require the account. 14 Phila. 310, 322, 325. In various States, moreover, the probate court may, of its own motion, and without application of an interested party at all, make an order citing in the delinquent representative. *Witman's Appeal*, 28 Penn. St. 376; *Campbell, Re*, 12 Wis. 369. But one is not considered as refusing or neglecting to account, within the usual meaning of American statutes, until he has been cited by the probate court for that purpose. *Nelson v. Jaques*, 1 Greenl. 139; *McKim v. Harwood*, 129 Mass. 75; *Barcalow, Matter of*, 29 N. J. Eq. 282. And, upon showing the court that he has received no assets, he is excused; or, if good cause be furnished for further delay, the court is usually empowered to grant it. Citation to the representative is a matter of right. *Smith v. Black*, 9 Penn. St. 308. Cf. as to his refusal to account, *Cutter v. Currier*, 54 Me. 81. Where he has appeared in answer to a citation, he is affected with knowledge of all subsequent proceedings. *Duffy v. Buchanan*, 8 Ala. 27. And thus American probate practice is seen to be quite different from that which prevails in England.

court at a day stated, and show cause, if any they have, against its allowance, is usual in American probate practice, upon receipt of the administration account.<sup>1</sup> Citation may be dispensed with when all persons interested (or, more particularly, those entitled to the surplus) express, in writing, their request that the account be allowed without further notice; thereby assenting virtually to its allowance. But the assent of one or more persons in interest does not conclude the others, nor impair their own right to be cited in before the account is allowed.<sup>2</sup>

524. **As to the form of administration account,** it is usual for the executor or administrator, by way of general statement, to charge himself with the amount of assets which have come to his hands, and ask to be allowed for the amount of all debts and claims paid by him, together with the expenses of administration; the balance shown, if any, going over to the next account, or

But an executor or administrator is not bound to render either account or inventory, it is held, where no property has come to his hands. *Walker v. Hall*, 1 Pick. 20. Cf. 88 Fed. 573 (filing a statement under oath insufficient where the court made no order). And where special circumstances such as lapse of time, civil commotion, or the assent of interested parties, have rendered an exact accounting impracticable, while imputing no blame to the representative, the court will be lenient as to particulars. *Clark v. Eubank*, 80 Ala. 584. Cf. 13 Phila. 284; *Hirschfield v. Cross*, 67 Cal. 661, 8 P. 507 (defective account replaced). Nor is it to be supposed, in general, that any one but a creditor or other party in interest can call the representative to account, by recourse to the court.

<sup>1</sup> Citation is usually by newspaper publication, and the representative must obey the mandate as issued to him from the register's office. But, following the distinctions to be noticed between partial accounts and the final account, those of the former kind are not unfrequently passed upon by the judge without formal citation, the rights of interested parties being more sedulously protected at the final rendering; nor is a probate court always left without some statute discretion as to requiring a citation at all.

<sup>2</sup> A probate citation is usually published once a week for three successive weeks; the statute requirement should be carefully followed. See 16 Ala. 693. Where notice is given of an annual or partial settlement, a final decree is improper. 21 Ala. 363. See *Scott v. Kennedy*, 12 B. Mon. 510; 20 Miss. 649; *Probate Manuals of Smith, Redfield and Gary, passim*; also the provisions of local codes. In some States greater formality appears to be pursued, with vouchers for the judge to pass upon. See *Robinson v. Steele*, 5 Ala. 473; *Steele v. Morrison*, 4 Dana, 617; 5 Hayw. 261; 5 Dem. 21, 216. We have seen that claims upon an estate are in some States regularly filed for allowance in court. *Supra*, 420. It is customary, however, in New England States, and in many others, for the executor or administrator to pay and keep his own vouchers for payments, presenting such vouchers for the court's inspection upon any controversy.

In some States, where one of the persons interested in a final accounting is an infant, or not *sui juris*, a special guardian must be appointed to represent him. *Gunning v. Lockman*, 3 Redf. 273. And see *Hutton v. Williams*, 60 Ala. 107. But, in others, a published citation appears to dispense practically with other formalities. In some States accessible parties, such as a distributee residing within the county, are entitled to personal service of the notice of final settlement. 34 Miss. 322. Neglect of legatees, etc., to attend at the final settlement, enables the representative to proceed *ex parte* as to those who fail to appear. 4 Paige, 102. Notice is not a pre-requisite to probate jurisdiction, and the want of notice may be cured by the voluntary appearance of the parties interested. 35 Ala. 295. Creditors of distributees are not parties in interest who may object to the representative's account. 40 Ala. 289.

remaining finally for distribution.<sup>1</sup> The proper number of each administration account is stated on its face; a final account, moreover, should plainly purport to be such.<sup>2</sup>

525. **Procedure upon the account submitted** is simple. A probate account is usually submitted on oath by the executor or administrator. This oath, to the effect that the account is just and true, is administered in open court by the judge of probate, according to the more exact practice.<sup>3</sup> Whether the oath to the account is administered by the judge or not, his decree of approval is generally essential, before its formal allowance. Much of this accounting is non-contentious and formal; and with the rendering of his account, thus sworn to, together with an affidavit that the citation to interested parties has been duly served, if citation was ordered, or, instead, their written assent, the duty of the executor or administrator is fulfilled. But the judge of probate may at discretion scrutinize the account, ask proof as to particular items, and ascertain judicially that the account is correct before allowing it.<sup>4</sup> And if parties interested appear and object to its allowance as presented,<sup>5</sup> a fair hearing should be given them. The court may allow, disallow, or order the accountant to charge himself with sums received which should have been entered, and practically require a restatement of the account, with proper corrections, as justice may require; though as to compelling such restatement, independently of a clear statute authority, the power of a probate judge may be questioned.<sup>6</sup> The executor or administrator, as

<sup>1</sup> A convenient form, adopted in various States, makes the general statement on the face of the account refer for details to schedule A. and schedule B.; schedule A. sets forth the items with which the representative charges himself, making the inventory valuation of personal property the first item in a first account, and the balance from the next preceding account the first item in each succeeding account; schedule B. details the payments, the losses upon the inventory valuation, and charges. The usual rules of single-entry bookkeeping are followed, as to entering dates, parties, sums received or paid, and the like. In many States, blanks are supplied at the probate registry for the purposes of probate accounts.

<sup>2</sup> *Bennett v. Hannifin*, 87 Ill. 31. But see *Stevenson v. Phillips*, 21 N. J. L. 77.

<sup>3</sup> Current legislation, however, tends to facilitate such business, where the judge's duties are onerous, by permitting the oath not only to be taken out of court, but to be administered by any justice of the peace. See *Gardner v. Gardner*, 7 Paige, 112.

<sup>4</sup> Especially if the rights of infants or absentees are concerned. *Gardner v. Gardner*, 7 Paige, 112.

<sup>5</sup> The probate court may proceed to determine whether a party who objects to an account has any interest in the estate, notwithstanding such party's sworn statement that he has an interest. Next of kin, though resident abroad, has a status. 65 N. E. 561, 172 N. Y. 547, 63 L. R. A. 95; 29 Cal. 514; *Halleck's Estate*, 49 Cal. 111. The interest should be alleged of record. 2 Harring. 273. And see 38 La. Ann. 830.

<sup>6</sup> See 40 Miss. 704. But the court may have a correction made by reference or otherwise where the representative does not correct the account. 41 Miss. 411. And see 174 Penn. St. 628, 34 A. 316.



various local codes declare, may be examined on oath before the court, upon any specific matter relating to his accounts;<sup>1</sup> and the party at whose instance interrogatories have been proposed to him has a right to offer evidence to disprove his answers.<sup>2</sup> Hearings before a judge of probate upon an administration account are generally quite informal; and issues are raised, and questions put and answered, regardless of technical rules, the judge seeking to elicit truth upon a summary hearing, that he may decide correctly and quickly.<sup>3</sup> In settling an administration account, a probate or equity court is not usually bound by technical rules of evidence.<sup>4</sup>

526. **Periodical or partial accounts and the final account** are to be distinguished. Periodical return is part of our American probate system; a first account being ordered within a stated time, usually one year from the date of appointment; and other accounts from time to time, or, perhaps, annually, until the estate is fully

<sup>1</sup> *Stearns v. Brown*, 1 Pick. 530; *Hammond v. Hammond*, 2 Bland, 306; 44 Mich. 57, 6 N. W. 115. And see 1 Bradf. 356. The duly verified administration account is *prima facie* correct. 4 Redf. (N. Y.) 265. But as to burden of proving, see 81 N. E. 294, 195 Mass. 559 (stat.); 67 A. 192, 56 S. E. 922, 144 N. C. 257; local code.

<sup>2</sup> 8 Pick. 484; *Wade v. Lobdell*, 4 Cush. 510. As in the old ecclesiastical practice, the executor or administrator is a competent witness to small charges. *Bailey v. Blanchard*, 12 Pick. 166 (charges "not exceeding forty shillings" or, perhaps, five dollars). But larger items objected to he ought to support by vouchers or other extraneous proof. *Hall v. Hall*, 1 Mass. 101; 19 Tex. 317; 12 La. Ann. 537; 2 Dev. & B. Eq. 325; 63 Cal. 349. One money standard, and that the prevalent and legal one, ought to regulate the whole accounting. See 2 Call, 190; *Magraw v. McGlynn*, 26 Cal. 420. As to disclosing partnership assets, see 17 Abb. (N. Y.) Pr. 165.

<sup>3</sup> *Nichols, Re*, 4 Redf. 288. Oral testimony is generally admitted, and explanations are made by the representative, often without being specially sworn at all. Where, however, disputants insist upon it, the rules of judicial investigation are more strictly observed; the representative is put upon oath as to items, and, if chancery precedents be favored, those surcharging an account should specify the particular items objectionable, and issues should be framed accordingly. *Rathbone's Estate*, 44 Mich. 57, 6 N. W. 115; *Stearns v. Brown*, 1 Pick. 530. See *Tanner v. Skinner*, 11 Bush, 120. But this rule is flexible as applied. 7 Paige, 112; *Buchan v. Rintoul*, 70 N. Y. 1. And see 174 Penn. St. 628, 34 A. 316. But an examination is not usually confined to written interrogatories and answers, though it may be thus conducted; and even should the account be regularly audited, strict proof of items may be dispensed with where, from the nature of the case, vouchers cannot be produced. *Lidderdale v. Robinson*, 2 Brock. 159. Vouchers alone may not be strictly evidence of payments without authentication, but they are accepted usually if not objected to. 2 Dev. Eq. 137.

<sup>4</sup> 2 Pa. 419; *Romig's Appeal*, 84 Penn. St. 235. In some States an account in contentious business may be made before an auditor under the probate court's direction, and he will report. *Hengst's Appeal*, 23 Penn. St. 413; *Pollock, Re*, 3 Redf. 100; 3 Redf. 177; *Tucker v. Tucker*, 28 N. J. Eq. 223. And see *Boughton v. Flint*, 74 N. Y. 476. The probate court need not refer matters to an auditor where the facts can be conveniently ascertained and determined without doing so. *Maxwell v. McClintock*, 10 Penn. St. 237. An audited administration account is not conclusive; either distributees or the representative himself may oppose its acceptance. 90 N. C. 537. See further, 73 Ala. 238; 106 Penn. St. 498. Objections to an account should be specific. 74 Ala. 332; 87 Ind. 294.

settled.<sup>1</sup> Hence, as estates may not always be legally wound up within one year, a practical distinction between partial accounts and the final account which closes the administration.<sup>2</sup> The rule is, that partial accounts of administration are, especially if rendered without citation, *prima facie* correct, but nothing more, and bind no one in interest; and that, on a final settlement, they may be so far opened up, without any special application, as to correct errors therein, whether originating in fraud or misapprehension, and although the error was not excepted to when the partial account was rendered, nor when appealed from.<sup>3</sup> But, on the final account,

<sup>1</sup> Upon the final accounting, the probate judge or surrogate has generally a jurisdiction to hear and determine a disputed claim of the executor or administrator himself against the estate; and even though the claim were such that equitable relief for enforcing it could only be had in chancery, the right to retain out of the assets of the estate a sum of money as belonging or due to him, brings the matter fairly within the province of the tribunal which passes upon the account. *Boughton v. Flint*, 74 N. Y. 476; 67 N. Y. 400. See, as to retainer, *supra*, 439; *Watson v. Watson*, 58 Md. 442; 62 Cal. 186; *Kinnan v. Wight*, 39 N. J. Eq. 501. The excess of commissions allowed on an intermediate account cannot be examined by exceptions to a subsequent account, but if excessive commissions were allowed, that fact may be considered in fixing their commissions for subsequent services. 36 N. J. Eq. 515. And see next c.

<sup>2</sup> As to requiring annual returns, see *Wellborn v. Rogers*, 24 Ga. 558. The periods for settling accounts are prescribed in each State by statute; and accounts later than the first are sometimes left discretionary with the court. See local statute; *Musick v. Beebe*, 17 Kan. 47. Where assets come to the hands of the executor or administrator after a partial account, he is bound to render a supplementary account, including such assets, within a reasonable time afterwards. 28 Penn. St. 376; *Shaffer's Appeal*, 46 Penn. St. 131. A representative's duty to file annual or partial returns is a statute requirement, and conditions not expressed in the statute cannot be interpolated. *Koon v. Munro*, 11 S. C. 139.

<sup>3</sup> *Coburn v. Loomis*, 49 Me. 406; *Clark v. Cress*, 20 Iowa, 50; *Goodwin v. Goodwin*, 48 Ind. 584; 58 Iowa, 36, 11 N. W. 723; 75 Mo. 204; *Picot v. Biddle*, 35 Mo. 29, 86 Am. Dec. 134; 3 Munf. 198; *Grant v. Hughes*, 94 N. C. 231; 37 S. C. 123. Former accounts, too, may be opened up for correction of fraud or mistake, upon the filing of subsequent partial accounts, as various local acts plainly sanction. *Stayner, Jr.*, 33 Ohio St. 481; *Shepley, J.*, in *Sturtevant v. Tallman*, 27 Me. 85; *Stearns v. Stearns*, 1 Pick. 157; *Sumrall v. Sumrall*, 24 Miss. 258; *Stephenson v. Stephenson*, 3 Hayw. 123; *Mix's Appeal*, 35 Conn. 121, 95 Am. Dec. 222. A final account has the force of a final judgment, and is taken to be conclusive, unless appealed from or impeached for fraud; while a partial account is only a judgment *de bene esse*; for according to such practice, the latter is often rendered *ex parte*, and without notice to persons interested, and may be considered as given chiefly for the information of the court, and the convenience of the personal representative in the management of the estate. *Musick v. Beebe*, 17 Kan. 47; *State v. Wilson*, 51 Ind. 96; *Sheetz v. Kirtley*, 62 Mo. 417; 68 A. 811; *Liddell v. McVickar*, 6 Hals. 44; *Snodgrass v. Snodgrass*, 57 Tenn. 167.

Annual and partial accounts are peculiarly valuable as serving to show the representative's liability, and for keeping the court and interested parties informed of the general condition of the estate while in process of settlement, and ascertaining whether the representative's bond should be increased. They afford *prima facie* evidence of the facts they state; and it is proper enough for interested parties to object, when the partial account is rendered, to the allowance of any item therein stated. Practically, indeed, the rendering of periodical accounts is often found to bring dissensions in between the representative and parties in interest to an issue before the interests of the estate have suffered too far; while executors and administrators are thus kept to

the general fairness of the administration comes up properly for a final review. Such an account, in order to operate as conclusive upon all concerned, can only be rendered upon due publication of notice to creditors and all persons interested, unless their assent is expressed; the time for rendering it is when the estate has been fully administered, unless one's office for some reason sooner expires; it is properly for the protection of the representative, and as a final adjudication of all controversies so far as his official conduct is concerned. On this final account, errors and mistakes in all former accounts may and should be corrected, once and for all, and improper items stricken out; and disputes of charge, compensation, and allowance finally determined; nor is the allowance of previous partial accounts without notice to legatees or next of kin, conclusive upon them, but they may object on the final account, and the court is bound to consider evidence from them disproving or reducing former items.<sup>1</sup> Errors which result not from administration but the accounting are readily rectified, no real harm resulting.<sup>2</sup> This final account, once examined and approved by the probate court, after due citation, and not reversed on appeal, operates as a final judgment; it concludes in general all the parties interested, and cannot be reopened or annulled in any court, except it be by direct proceedings in probate, or perhaps in chancery, for fraud or manifest error.<sup>3</sup>

a diligent and faithful discharge of their duties, and the judge of probate may the better pacify or protect legatees and kindred when they and the representatives of the estate fail to harmonize.

<sup>1</sup> *Mix's Appeal*, 35 Conn. 121, 95 Am. Dec. 222; *Brazeale v. Brazeale*, 9 Ala. 491; *Collins v. Tilton*, 58 Ind. 374 (a free re-opening allowed to the judge). And see *Bantz v. Bantz*, 52 Md. 686; *Clement's Appeal*, 49 Conn. 519.

<sup>2</sup> *Little v. Little*, 161 Mass. 188, 36 N. E. 795.

<sup>3</sup> *Austin v. Lamar*, 23 Miss. 189; 15 Abb. (N. Y.) Pr. 12. As to appeal, etc., see 530, *post*. See, as to the analogous case of guardianship accounts, *Schoul. Dom. Rel.* 3d ed. § 372, and cases cited. And see *Mayo v. Clancy*, 57 Miss. 674; *Seawell v. Buckley*, 54 Ala. 592; *Musick v. Beebe*, 17 Kan. 47; 105 Iowa, 564, 75 N. W. 482; 144 Mo. 258, 46 S. W. 135. A final account allowed is voidable at the election of one not duly cited as entitled nor brought into the account. 54 Miss. 700. But the power to re-open a final account should be exercised only in rare instances and with great caution. *Decker v. Elwood*, 1 Thomp. & C. (N. Y.) 48; *Strong v. Strong*, 3 Redf. 477. Only a court of equity, and not a probate court, can open a settled account in some States. *Harris v. Stilwell*, 4 S. C. 19. Though such is not the rule. The final settlement does not preclude further inquiry in regard to the assets of the estate in the hands of the representative not accounted for nor passed upon. 528, *post*. See 5 Hun, 16; 4 Redf. 180. But it concludes as against the representative, that what was charged in the accounting as assets was such. *McDonald v. McDonald*, 50 Ala. 26. And a final account regularly allowed is presumed to embrace everything which was the proper subject of inquiry. *Brown v. Brown*, 53 Barb. 217. See *Davis v. Cowden*, 20 Pick. 510; *Sever v. Russell*, 4 Cush. 518. See local statutes in detail, inclusive of the case where new assets come to hand after such final settlement. As to infant distributees represented by a guardian *ad litem*, see 67 Ala. 271; 198 N. Y. 434. And see *Irvine's Estate*, 58 A. 618, 209 Penn. 325 (supplementary to final account).

527. The rendering of a final account appears to be, strictly speaking, a proceeding distinct from the settlement thereof; that is to say, the executor or administrator sets forth to the court in his accounts the true condition of the trust, and of his administration, without bringing into his statement the payments made to any of the distributees or residuary legatees on account. Usually, in our local practice, a decedent's estate is closed in the probate accounting; payments made in true proportion to all proper parties being thus exhibited, without the formality of a further decree, as for distribution. But, when this course is pursued, the distribution statement or schedule should be kept distinct; for the probate accounting, in theory and apart from local code or practice, settles nothing but the basis upon which distribution may afterwards be made in a proper tribunal, and ascertains what balance, if any, is left for that purpose.<sup>1</sup> In some States, therefore, the decree made

The broad distinction between partial and final accounts, is not, however, universally approved in American probate practice of late years. Thus, in Pennsylvania, where it was formerly usual to admit exceptions, when a final account was filed, to that or to any previous probate account, all partial accounts are, under later legislation, rendered, when confirmed absolutely and upon due consideration, and without an appeal, final and conclusive, in regard to all that they contain, though not as to what may have been reserved for a future account. 39 Penn. St. 186; Fross's Appeal, 105 Penn. St. 258; 57 Penn. St. 43. In Massachusetts, too, and some other States, the policy is manifestly to discourage, at all events, the re-opening of disputes which were actually heard and determined on one account, when later accounts are exhibited. *Smith v. Dutton*, 4 Shepley, 308; *Cummings v. Cummings*, 128 Mass. 532; 6 Met. 194, 39 Am. Dec. 716. But, in order to give a conclusiveness to partial accounts it appears proper not only that no appeal should be taken, but also that the account should have been allowed after the usual citation to parties interested, or their appearance or waiver of notice; for, as in a final account, the decree of allowance on a partial account ought not to bind conclusively those who were not made parties to the accounting. *Supra*, 523; *Crawford v. Redus*, 54 Miss. 700. And see local statute.

An executor or administrator having been surcharged or falsified on exceptions to his administration, all parties interested in the surplus are entitled to participate in the balance as finally ascertained, in due proportion, though some of them filed no exceptions to the account. *Charlton's Appeal*, 34 Penn. St. 437. It is prudent, when the accountant finds his account disputed in important respects, for him to request the party objecting to specify in writing the items objected to; for then, the account being once settled, the particular items disputed and determined will be shown by the record. Some statutes provide that, upon the settlement of an account, all former accounts rendered in the course of settling the same estate may be so far opened as to correct a mistake or error therein; but that a matter which has been previously heard and determined by the court, shall not, without leave of the court, be again brought in question by any of the disputants. *Cummings v. Cummings*, 128 Mass. 532; 6 Met. 194, 39 Am. Dec. 716; *Watts v. Watts*, 38 Ohio St. 480. See also *Ward's Estate*, 116 N. W. 23, 150 Mich. 218.

<sup>1</sup> See *Ake's Appeal*, 21 Penn. St. 320; 1 Barb. Ch. 473; *Tappan v. Tappan*, 30 N. H. 50; *Fleece v. Jones*, 71 Ind. 340; *Arnold v. Smith*, 14 R. I. 217. Where the distributees or residuary parties in interest are clearly known, the representative is practically safe in settling with them on their several receipts for their respective proportions, and rendering his final account as upon such a distribution, thereby dispensing with formalities and needless delay. Legacies, in general, like creditors' claims, are paid upon proper vouchers.

upon an administrator's final accounting determines simply the amounts received and paid out by the representative, and the balance due from him to, or to him from, the estate; and a decree of distribution, settling the rights of residuary legatees or distributees, is afterwards in order.<sup>1</sup> But, as to testate estates, a probate court has no inherent jurisdiction to decide who are entitled as legatees under the will; nor can it, in the absence of some enabling act, decree to whom, or at what time, legacies, or the residuary fund, shall be paid.<sup>2</sup> Agreeably, however, to the jurisdiction conferred upon probate courts in various States, this court, subject to the usual appeal, may settle all questions relative to legacies.<sup>3</sup>

The words "final settlement," however, in a statute may be construed not to signify the mere ascertainment of the final cash balance in the hands of the executor or administrator; a payment of that balance being also included. *Dufour v. Dufour*, 28 Ind. 421. It is irregular practice to petition for an account and for distribution together. 11 Phila. 43.

<sup>1</sup> *Johnson v. Richards*, 5 Thomp. & C. (N. Y.) 654; 15 N. J. L. 92; 7 Baxter, 406. The distribution of intestate estate lies peculiarly within the province and jurisdiction of American probate courts; and local statutes define the method by which the administrator or any one of the distributees may, on application to the probate court, obtain an appropriate decree. The decree of distribution, which is founded upon the final balance shown by the accounting, specifies the names of persons who are entitled to share in the estate and the amount payable to each. *Loring v. Steineman*, 1 Met. 204. A decree in favor of a distributee is conclusive as to amount, allowing for all previous advancements. *Cousins v. Jackson*, 49 Ala. 236. As to the liability of an administrator who has made distribution without judicial direction, where others entitled to distribution appear, see 2 Call (Va.) 95. In some States an order of distribution is imperative. 19 La. Ann. 97. Accounts, with items showing partial and unequal payments to distributees, do not supply the correct balance upon which distribution is to be made. See 53 Ga. 282.

The notice requisite for a decree may be prescribed by statute, otherwise the notice is such as the court in its discretion shall deem proper. 1 Met. 204. See 49 Wis. 592; 60 Ill. 27. The probate court has no authority to make an order for distribution to the assignee of a distributee's share. *Knowlton v. Johnson*, 46 Me. 489; *Holcomb v. Sherwood*, 20 Conn. 418; *Portevant v. Neylans*, 38 Miss. 104. And it is no valid objection to a decree of distribution that it was made on its face in favor of parties who were not applicants for the decree, or whose shares had been satisfied or released. *Sayre v. Sayre*, 16 N. J. Eq. 505. Nor should the administrator be thus decreed to apply the distributee's share to a debt due to the administrator personally. 13 Ala. 91; 3 Grant (Pa.) 109; 25 Miss. 252. Nor to make deduction from the share of any one on account of a debt he owes to the estate. 17 Mass. 81. But such equities may be regarded in the course of compliance with a decree of distribution. See 6 Ired. Eq. 341; 2 Barb. Ch. 533; 29 Penn. St. 208; 3 Cranch, C. C. 61. And it would appear that a *bona fide* payment made under the decree of distribution to the attorney in fact, or actual assignee of the distributee named therein, is a compliance with the order. 3 Redf. (N. Y.) 461.

<sup>2</sup> *Smith v. Lambert*, 30 Me. 137; *Cowdin v. Perry*, 11 Pick. 503. Legacies in many States may be sued for and recovered at common law. *Farwell v. Jacobs*, 4 Mass. 634; *Smith v. Lambert*, 30 Me. 137. Beyond this, the subject is more especially one of chancery jurisdiction, and the probate records are not conclusive of the rights of such parties, though doubtless important evidence.

<sup>3</sup> *Sandford v. Thorpe*, 45 Conn. 241. Accordingly, where the construction of a will is necessary to determine questions arising on the account of administration, the court of probate jurisdiction in such States may pass upon the construction of the will, for this attaches as incidental to the accounting. *Purdy v. Hayt*, 92 N. Y. 446.

Decrees which confirm the accounts of executors or administrators are not to be opened and re-examined, at all events, where the balance thereby found to be due has, in the meantime, been actually paid and discharged.<sup>1</sup> But various local codes provide for equitable relief, whether by petition in the probate court, or otherwise, so as to reopen afterwards a probate settlement upon a proper showing of mistake or fraud, and by a direct attack upon that settlement.<sup>2</sup>

528. **Such is the conclusiveness of a final settlement** of the representative in the probate court, operating as the judgment of a court of competent authority, with jurisdiction of the subject-matter and of the person, that it cannot be called in question, except by a direct proceeding, such as appeal or writ of error;<sup>3</sup> and only in the probate court when impeached for fraud or manifest error; though, if the proceedings in that court were such that they may be treated as a nullity the executor or administrator may be cited to account there anew.<sup>4</sup> While a decree of the probate court settling an executor's or administrator's final account, partakes of the nature of a final judgment, its conclusiveness is nevertheless restricted to the matters involved, and the items, together with the surplus, as passed upon and shown of record.<sup>5</sup>

<sup>1</sup> *Lehr's Appeal*, 98 Penn. St. 25.

<sup>2</sup> See *Arnold v. Spates*, 65 Iowa, 570, 22 N. W. 680; local codes; *Brandon v. Brown*, 106 Ill. 519.

<sup>3</sup> 9 Mo. 362; *Barton v. Barton*, 35 Mo. 158; *Austin v. Lamar*, 23 Miss. 189; 15 Abb. (N. Y.) Pr. 12.

<sup>4</sup> *Davis v. Cowden*, 20 Pick. 510; *Decker v. Elwood*, 1 Thomp. & C. 48. Thus there should be due citation to parties interested on such account in order to operate conclusively. 144 Mo. 509, 46 S. W. 202. The probate settlement remains conclusive evidence not only of the fact of receipts and payments, as specified, but of the validity of those receipts and payments. 1 Hoffm. 202; *Burd v. McGregor*, 2 Grant, 353; 52 Cal. 403. Nor can a decree of the probate court, duly allowing the final account of the representative, be collaterally impeached; as in an action at law against him, upon a claim against the deceased. *Parcher v. Bussell*, 11 Cush. 107; *Harlow v. Harlow*, 65 Me. 448; *Sanders v. Loy*, 61 Ind. 298; 526; 13 Lea, 728. See *Blake v. Ward*, 157 Mass. 94, 31 N. E. 693 (a partnership settlement).

<sup>5</sup> A balance found due upon formal accounting may in some cases be a cash balance; and a careful executor or administrator will take heed that items of doubtful value, which may affect a just cash balance for distribution, are duly stated at the final hearing, and weighed by the court. But the balance, as found on such accounting, is in strict truth a balance, not of money, but of the estate undisposed of remaining for distribution, and the schedules will frequently show that this balance is made up of various items of personal property not reduced to cash, which, at their stated valuation, the representative stands ready to transfer. *Sellero's Appeal*, 36 Conn. 186. Distributees may agree to take the securities left. 111 N. Y. S. 40. That one may be cited to account for what does not appear on his accounts, see *Flanders v. Lane*, 54 N. H. 390; 88 Md. 151, 40 A. 705. See as to order discharging the representative, 86 Tex. 207, 24 S. W. 389.

Nor is the decree of distribution, as to the balance shown by the administration accounts, a payment.<sup>1</sup>

529. **The executor or administrator may perpetuate the evidence of his payments or distribution of the surplus, as of record, according to the statute practice of various states, in connection with his discharge.** The usual course is for him to return the court's decree of distribution, with indorsements, showing full payments made under it, or within a specified time to present what is in substance a final statement exhibiting the distribution of the balance for which he was accountable to the parties entitled.<sup>2</sup> Such procedure results in his final discharge by the court.<sup>3</sup> In some States it appears to be the practice of the probate court to enter a judgment of dismissal by way of discharging liability on the part of the personal representative; but an order of discharge upon a final account will not be regarded as a final settlement if assets of the estate actually remain unadministered in the hands of the fiduciary.<sup>4</sup> For though an executor or administrator may die or be regularly removed or permitted to resign, his authority continues otherwise until the estate is fully settled; and there is no successor without due credentials upon a proper vacancy.<sup>5</sup>

530. **Appellate jurisdiction from our probate tribunals is discreetly exercised in most States, as respects the probate accounting**

<sup>1</sup> It is not a payment so as to discharge the executor or administrator, nor is it a payment so as to exonerate the fund distributable. The decree gives to the distributee a remedy against the executor or administrator personally for his proportion of the fund found to be in the latter's hands, but this does not impair his remedy against the fund itself. Nothing short of actual payment, or some act of the distributee to its prejudice, will exonerate the trust fund from the distributee's claim. *Brown, J., in Clapp v. Meserole*, 38 Barb. 661. And see, as to the form of such decree of distribution, *McCracken v. Graham*, 14 Penn. St. 209. As to the effect of a settlement of the residue out of court, after a partial settlement in court, see 27 Ohio St. 159.

An executor or administrator whose accounts have once been settled will not be ordered to account further because of the existence of possible assets not within his control, but which, after a third party shall have acted, may come to his hands. *Soutter, Re*, 105 N. Y. 514, 12 N. E. 34. And see 3 Dem. 414. And the reasonable presumption from a probate decree which judicially settles the representative's accounts, where all the parties interested have been cited, is that the account was correct, and all the assets have been accounted for. A further accounting, therefore, should only be ordered when it appears clearly that there are other matters not embraced in the former account, for which the representative is responsible, and has not already accounted. *Ib.* And see *McAfee v. Phillips*, 25 Ohio St. 374; 16 Ohio St. 274.

<sup>2</sup> See e.g., Mass. Pub. Stats. c. 144, § 2, with provisions in detail. Unclaimed moneys, which the court has ordered paid over, may be placed on deposit with the judge, or in the public treasury, according as local enactments prescribe, thereby discharging the executor or administrator, and his sureties, from all further responsibility for the funds. See local code.

<sup>3</sup> *Ib.*

<sup>4</sup> 18 Ga. 346; 10 Ind. 528. But, if a settlement is reopened, all concerned may have the benefit. 56 Ga. 297.

<sup>5</sup> 37 Iowa, 684; *Weyer v. Watt*, 48 Ohio St. 545, 28 N. E. 670.

just set forth. And, upon appellate proceedings, the supreme court declines to act as if entertaining an original jurisdiction over the account. For, as it is said, the court of probate can only be deprived of its statute jurisdiction for the settlement of a personal representative's accounts by some process or course of proceeding which would legally remove the settlement to another tribunal.<sup>1</sup> Where a mistake is made in the settlement of a probate account, the proper course is to apply to the judge of probate for its correction, or to state the amount claimed in a new account; unless, when the mistake is discovered, the party has already a right of appeal to the supreme tribunal, and may there have it corrected.<sup>2</sup> If the probate court reopens, or refuses to reopen, a final accounting in a proper case, there lies a direct remedy by appeal.<sup>3</sup>

531. **The case of a vacancy in the office** in connection with the rendering of probate accounts is explicitly provided for in our local statutes. Thus, when one of two or more joint executors or administrators dies, resigns, or is removed before the administration is completed, the account is rendered by the survivor or survivors.<sup>4</sup> And when a representative dies, not having settled his sole account, a final account should be rendered by his own executor or administrator.<sup>5</sup> Local statutes provide for the closing of accounts by a

<sup>1</sup> And, hence, probate jurisdiction remains, although the personal representative, who had before been cited to settle his accounts, had neglected to do so, and leave had been granted to bring a suit upon his bond. *Sturtevant v. Tallman*, 27 Me. 78. Appeal does not lie from the refusal of an account informally presented. 50 Ala. 39. See further, 39 A. 569, 91 Me. 234; 29 N. W. 867, 63 Mich. 355. Nor will the supreme court, as a court of chancery, resettle an administration account alleged to have been fraudulently settled in the probate court. *Jennison v. Hapgood*, 7 Pick. 1, 19 Am. Dec. 258; 4 Cush. 513, 50 Am. Dec. 811. As to the States where liberal chancery powers are asserted by way of a sort of concurrent jurisdiction with probate tribunals, see *supra*, 522. A judgment of the probate court may be impeached for fraud in a court of equity, in a proper case. *Anderson v. Anderson*, 178 Ill. 160, 52 N. E. 1038. See further, 160. So, too, it has been held that former accounts from the allowance of which no appeal was taken, and the matters passed upon in them, are not subject to a revision and readjustment upon an appeal from the allowance of a later account in which the same question was not raised. *McLoon v. Spaulding*, 62 Me. 315; 27 Me. 78; 49 Me. 406, 561. But the supreme court, while disclaiming to act otherwise than as an appellate tribunal with reference to probate accounts, construes sometimes the latest legislation, not only as modifying the former rule of probate conclusiveness, but as allowing a re-opening on appeal more liberally. *Blake v. Pegram*, 109 Mass. 541. And see *Williams v. Petticrew*, 62 Mo. 460; *Seymour v. Seymour*, 67 Mo. 303; *Sherman v. Chace*, 9 R. I. 166; *Reed v. Reed*, 68 A. 849, 80 Conn. 401.

Setting aside on appeal a decree of distribution does not necessitate the setting aside of the final account upon which distribution was based. 90 Wis. 480, 63 N. W. 1042.

<sup>2</sup> *Stetson v. Bass*, 9 Pick. 27; *Coburn v. Loomis*, 49 Me. 406. And see *Arnold v. Mower*, *ib.* 561.

<sup>3</sup> *Githens v. Goodwin*, 32 N. J. Eq. 286. As to re-opening a settled account by proceedings in the probate court, see *supra*, 526.

<sup>4</sup> Local code; 44 Hun. (N. Y.) 457; 3 Dem. 236.

<sup>5</sup> In case of the representative's death pending proceedings for the settlement of his accounts, the proceedings abate, and his own representative must account anew.



representative who resigns, or is discharged from his trust. Thus, it is declared, that an executor or administrator shall not be permitted to resign without first settling his accounts; and, on such rendering, the court should have the account carefully examined and approved like any other final account.<sup>1</sup> The final probate decree, on settlement of the accounts of a removed representative, will conclude his sureties, who, together with himself, are answerable for any defalcation in the trust.<sup>2</sup> The accounts of a successor should never be blended with those of his predecessor.<sup>3</sup> Where a predecessor's final account is duly prepared and presented and the administrator *de bonis non* is a party to such settlement, and duly represents the creditors and others interested, and afterwards such *de bonis non* representative makes his own final settlement, there is a final settlement of the whole estate.<sup>4</sup>

532. **The accounts of co-executors or co-administrators may, in the practice of some States, be rendered on the oath of one of them.**<sup>5</sup> In some other States, however, joint representatives may keep and file separate accounts, each charging himself with a part of the estate; and, it is held, that on the settlement of a subsequent account by one, he is not chargeable with the balance in the hands of the other, however might be the case in a suit upon their joint bond.<sup>6</sup> The separate accounts of co-representatives cannot be

3 Dem. 236. It has even been held, that it may be settled by the administrator of one of his sureties, for the protection of the bond. *Curtis v. Bailey*, 1 Pick. 199. But see 2 Pen. (N. J.) L. 562.

<sup>1</sup> *Supra*, 156; *Waller v. Ray*, 48 Ala. 468; *Sevier v. Succession of Gordon*, 25 La. Ann. 231. The parties to such final accounting are, besides next of kin, legatees, or distributees, as the case may be, the successor in the trust. *Waller v. Ray*, 48 Ala. 468. And see as to creditors, *Poulson v. Frenchtown Bank*, 33 N. J. Eq. 518. See also 3 Dem. 251; 120 Cal. 698; *Hudson v. Barrett*, 61 P. 737, 62 Kan. 137. But, without appropriate legislation, the probate court cannot, perhaps, order an account from one whose resignation has already been accepted. See 6 Tex. 130.

<sup>2</sup> *Kelly v. West*, 80 N. Y. 139. See local code as to a balance found due; 13 Ala. 749; *Munroe v. Holmes*, 9 Allen, 244; *Bingham, Re*, 32 Vt. 329.

It is not to be inferred that a final settlement upon the accounts of a representative who has died, resigned, or been removed, while in the exercise of his functions, is a "final settlement," so to speak, of the estate; for it is rather a transfer of the predecessor's just balance to the successor. See 40 Miss. 747.

<sup>3</sup> *Hamaker's Estate*, 5 Watts, 204.

<sup>4</sup> *State v. Gray*, 106 Mo. 526, 17 S. W. 500.

<sup>5</sup> E.g., Mass. Pub. Stats. c. 144. See 4 Dem. 364 (joint account presented by one without signature of the other); *Conner v. McIlvaine*, 4 Del. Ch. 30 (joint liability for balance with contribution thus presumed).

<sup>6</sup> *Davis's Appeal*, 23 Penn. St. 206; *Bellerjeau v. Kotts*, 4 N. J. L. 359. There may be advantage in such a course; for, on general principle, the settlement of a joint account by co-executors or co-administrators, and its confirmation, showing a cash balance in their hands, admits and adjudges their joint liability; and a division of the fund between them does not sever that liability. *Duncommun's Appeal*, 17 Penn. St. 268; *Laroe v. Douglass*, 13 N. J. Eq. 308. Though, as to securities which appear to be uncollected, by their joint accounts, no conclusive liability, of course, arises. *Lightcap's Appeal*, 95 Penn. St. 455.

combined in making the distribution; and, having filed separate accounts, they have no joint duty to distribute.<sup>1</sup>

**533. Long lapse of time may justify a refusal to order an account of administration;** especially, in connection with other strong circumstances, such as the death of all the parties cognizant of the transactions, destruction of the county records, and loss of public papers; for, otherwise, there would be danger of injustice to the deceased personal representative.<sup>2</sup> But, however it may be with a judicial accounting, a court may presume, a considerable time having elapsed since the estate should have been settled and the functions of the representative terminated, that the debts have all been paid, in fact, and the affairs of the estate finally and justly settled. Final settlements ought to be seasonably and directly assailed, in order to avoid their effect as judgments importing verity.<sup>3</sup>

**534. Where the residuary legatee has given bond as executor, to pay the testator's debts and legatees, a bill in equity cannot be maintained against him for an accounting for assets and administration in chancery;** nor, of course, can a probate accounting be compelled. For the assets of the estate become part of his general

<sup>1</sup> *Heyer's Appeal*, 34 Penn. St. 183. Co-executors, who have received and inventoried a trust fund held by their testator as executor, and have jointly settled their final probate account, are jointly chargeable with the trust balance ascertained to be in their hands. *Schenck v. Schenck*, 16 N. J. Eq. 174. See also, 400-406.

As to a temporary or special administrator's accounts, see local code; 4 Dem. 450. In Massachusetts special administrators are held to account whenever required by the probate court; and public administrators, who have given a general bond, render an annual account of all balances in their hands, besides annual accounts as to each separate estate. See other local codes applicable in such cases.

<sup>2</sup> *Stamper v. Garnett*, 31 Gratt. 550; 79 Va. 468. As to a presumption of settlement after lapse of time, see 9 Phila. (Pa.) 344. Under ordinary circumstances, however, a lapse of time less than twenty years appears to constitute no bar to the ordering of a probate account. *Campbell v. Bruen*, 1 Bradf. 224. Or even twenty-five years. 14 Phila. 297. But, where the administration has been closed, and the representative formally discharged, it may be different. See *Portis v. Cummings*, 14 Tex. 139; 5 Dem. 453. Local methods are not uniform in this respect. Some codes show a special favor to the private settlement of estates among those interested, in disregard of a probate accounting.

<sup>3</sup> *State Bank v. Williams*, 6 Ark. 156; *Williams v. Petticrew*, 62 Mo. 460. See *Schoul. Dom. Rel.* § 372; *Gregg v. Gregg*, 15 N. H. 190; *Pierce v. Irish*, 31 Me. 254; *Smith v. Davis*, 49 Md. 470. Where an account has been finally adjusted many years, those concerned acquiescing, apparently, in the settlement, it will not be reopened, except upon good cause shown for the delay, nor, usually, except to correct mistakes apparent. See *Davis v. Cowden*, 20 Pick. 510, where the delay shown was not such as imputed acquiescence in the account. But the representative may be cited at any time, to account for assets not included in his settled accounts, especially if they come to hand at a later date. *McAfee v. Phillips*, 25 Ohio St. 374; *supra*, 526; *Soutter, Re*, 105 N. Y. 114, 12 N. E. 34. Under circumstances importing good faith, an account filed late might be indulged as to specifying details.

property, and are no longer subject to the enforcement of a trust in favor of other legatees;<sup>1</sup> though his own estate is liable, like that of any debtor, for debts and legacies; and his bond affords security for the benefit of all such claimants.<sup>2</sup>

<sup>1</sup> *Clarke v. Tufts*, 5 Pick. 337; *McElroy v. Hatheway*, 44 Mich. 399, 6 N. W. 835.

<sup>2</sup> *Copp v. Hersey*, 31 N. H. 317; *supra*, 249.

## CHAPTER II.

## CHARGES AND ALLOWANCES UPON ACCOUNTS.

535. In the present chapter we shall consider (1) what may be charged to the executor or administrator in his accounts; and (2) what may be allowed him therein. We shall here suppose the account to have been prepared with items of the former kind debited to him as under schedule A., and those of the latter kind credited under schedule B.<sup>1</sup>

536. (1) **As to charges on accounting.** While bookkeeping accounts are usually conducted on the basis of receipts or payments in cash or their equivalent, the balance being struck accordingly, a peculiarity of accounting in most of our probate courts is, that the accountant shall charge himself, first of all, with the total amount of personal property as returned in the inventory.<sup>2</sup> An inventory appraisal is *prima facie* and not conclusive proof of the representative's liability for a corresponding amount; the real test of liability by which his accounts shall be settled being, whether he has bestowed honesty and due diligence in collecting, realizing upon, preserving, and disbursing the assets; and the financial result of his administration being stated accordingly.<sup>3</sup>

537. Hence, amounts received from all sources not included in the inventory, of the nature of personal assets, should be charged to the accountant, by suitable items, in the schedule: not specific gains upon the inventory valuation alone, but new assets, or such as from ignorance, inadvertence, or any other cause, were omitted

<sup>1</sup> See *supra*, 524. Every item of receipt and expenditure should be distinctly entered in the account. *Hutchinson's Appeal*, 34 Conn. 300; *Jones, Re*, 1 Redf. 263; 4 Day, 137. The account should include a statement of partnership affairs, if the surviving partner be executor. 2 Bradf. 165; 17 Abb. (N. Y.) Pr. 165.

<sup>2</sup> See *Bogan v. Walter*, 12 Sm. & M. 666. Accordingly, he is compelled to carry forward in schedule A., the bulk of personal assets on the appraisers' valuation; asking an especial credit in the schedule B., should any of these assets realize at a loss when disposed of, or be worth less for a distribution, than at their valuation; and, accounting, in fact, for all assets which have come to either his possession or knowledge, and not for his actual receipts alone. 49 N. J. Eq. 552. On the other hand, should particular assets fetch more, or be worth more in computing the final balance, than the amount stated in the inventory, the representative must charge himself with the excess. So, too, if assets inventoried as desperate and valueless, turn out to be worth something, their proper worth, or what they have actually realized, is to be debited to him in the account.

<sup>3</sup> *Weed v. Lermond*, 33 Me. 492; *Craig v. McGehee*, 16 Ala. 41. The items of the inventory need not be repeated in the account; but only the gross amount debited. 7 Barb. 39.

from the inventory itself,<sup>1</sup> and the income, interest, profits, premiums, and usufruct of every description, derived out of the assets in the course of a prudent and faithful administration; including premiums received, and interest with which the representative ought to be charged, because of culpable carelessness or his personal appropriation and misuse of the assets.<sup>2</sup> The profits accruing out of the decedent's estate should all be accounted for, whether they accrue spontaneously or by the representative's acts.<sup>3</sup>

538. **The representative must charge himself with interest**, and, in gross instances, with compound interest, in his account, where he has abused his trust.<sup>4</sup> This is a doctrine applicable, both in England and America, under modern chancery and probate practice,<sup>5</sup> to all trustees who prove delinquent or dishonorable in the

<sup>1</sup> But, by the practice of some States, a new inventory should be filed in such cases. *Supra*, 230.

<sup>2</sup> *Sugden v. Crossland*, 3 Sm. & G. 192; *Allen v. Hubbard*, 8 N. H. 487; *Liddell v. McVickar*, 11 N. J. L. 44, 19 Am. Dec. 369. Income should be stated as a separate item from the principal. 11 Phila. 113; *Stone v. Stilwell*, 23 Ark. 444. If there is no increase, profit, etc., that fact should be stated. 1 Redf. (N. Y.) 263.

<sup>3</sup> *Wms. Exrs.* 1657, 1847. And see *Sugden v. Crossland*, 3 Sm. & G. 192. And see as to wilful omissions, *Houts v. Shepherd*, 79 Mo. 141. As to profits which ought to have been made for the estate, see *Grant v. Reese*, 94 N. C. 720. And as to profit or loss from a sale, see 40 N. J. Eq. 158 (the usual standard of diligence and good faith applies).

The discussion of a representative's liability, in former chapters, may sufficiently show what an executor or administrator should be charged with. A cardinal principle in all trusts, already adverted to, is that the fiduciary shall make no personal profit out of the trust beyond what a court or legislation may fitly allow him by way of compensation for his services; and that, whatever the gains out of the assets, whether in the course of a rightful management or a perversion of his trust, shall go to enhance the fund, and not to enrich himself, and shall be duly accounted for. *Supra*, 322, 332, 358, 363; *Trimble v. James*, 40 Ark. 393. And see *Wms. Exrs.* 1842; *Jacob*, 607; 1 Cox, 134; *Wedderburn v. Wedderburn*, 22 Beav. 100. The personal representative is not authorized to take assets at their appraised value to his own use and make what profit he may out of them. *Weed v. Lermond*, 33 Me. 492. Bonuses from borrowers belong to the trust estate. 60 How. Pr. 217; *Landis v. Saxton*, 89 Mo. 375, 1 S. W. 359. One who trades or operates with the assets must account to the estate for all the profits realized. *Haberman's Appeal*, 101 Penn. St. 329. Premiums received where gold commanded a premium should be accounted for. 17 S. C. 521; 20 S. C. 64; 37 S. C. 123, 15 S. E. 917. Also the profit made on some purchase of assets inconsistent with his duty, reserving, however, the amount of his private disbursement. 80 Ala. 11.

<sup>4</sup> A court acts with discretion in such matters, and charging compound or excessive interest is not favored unless for exceptional misconduct. 33 So. 699, 135 Ala. 585; 35 So. 479, 111 La. 113; *Peterman v. Rubber Co.*, 77 N. E. 1108, 221 Ill. 581; 95 N. W. 697, 1 Neb. (Unoff.) 290; *Silkman, Re*, 83 N. E. 1131, 190 N. Y. 560; *Brigham v. Morgan*, 69 N. E. 418, 185 Mass. 27; *McIntire v. McIntire*, 24 S. Ct. 196, 192 U. S. 116, 48 L. Ed. 369.

<sup>5</sup> The charge appears to be supported on either of two sufficient grounds: one, that, by perverting the fund in question to his own use, the fiduciary has made a probable profit for which interest, or compound interest, may be supposed a fair equivalent; the other, that loss of interest, occurring through his remissness or misconduct, should be made up to the fund. In other words, all profits made with trust moneys, belong to the trust; and, furthermore, a culpable failure to make profit

management of the estate confided to them. Executors and administrators, however, are charged with more reluctance than trustees, for simply letting funds lie idle, since their primary function is to administer and not to invest;<sup>1</sup> but, for any wilful perversion of the assets, they are doubtless chargeable.<sup>2</sup> During the first year, after the decedent's death, more especially, the person who administers must often keep large sums in his hands lying

for the estate, out of funds which should have been made productive, is a waste. See as to trustees in general on this point, etc., *Perry Trusts*, §§ 468-472. If a trust company as executor issues its own certificates of deposit for the fund, this is essentially using the trust money for its own profit. 62 Minn. 408, 65 N. W. 74. See as to compound interest in cases of administration, 2 Rawle, 305; *Slade v. Slade*, 10 Vt. 192; 1 Ashm. 357; *Scott v. Crews*, 72 Mo. 261; *Clark, Estate of*, 53 Cal. 355; *Wms. Exrs.* 1851; *Jones v. Foxall*, 15 Beav. 388; 10 Pick. 77; *Blake v. Pegram*, 100 Mass. 541; 2 Barb. Ch. 213; *Hook v. Payne*, 14 Wall. 252, 20 L. Ed. 887.

<sup>1</sup> *Supra*, 322; *Wms. Exrs.* 1844-1851. As to indemnifying interest for long delay in proving a will, see *Stevens, Re*, (1898) 1 Ch. 162. If the representative charges himself with interest he may in various cases, be justly allowed dividends as an offset. *Dudley v. Sanborn*, 159 Mass. 185, 34 N. E. 181.

<sup>2</sup> Executors and administrators are liable for interest if they mingle assets with their private funds. *Griswold v. Chandler*, 5 N. H. 492; 1 Johns. Ch. 50, 527, 620; *Jacob v. Emmett*, 11 Paige, 142; 4 Cranch C. C. 509; *Grigsby v. Wilkinson*, 9 Bush, 91; *Troup v. Rice*, 55 Miss. 278; 53 Cal. 355. And see 11 Ala. 521. Or, where they are unreasonably delinquent in paying, investing, or disbursing funds, as the law, the testator, or the court may have expressly directed. 3 La. Ann. 353, 574; *Smithers v. Hooper*, 23 Md. 277; 6 Daly, 259; *Hough v. Harvey*, 71 Ill. 72. And this delinquency may involve a delinquency in accounting. 23 Md. 273; *Lommen v. Tobiason*, 52 Iowa, 665, 3 N. W. 715. Or, where the money is used for private gain and speculation. *Davis, Matter of*, 62 Mo. 450. Where they fail to account for interest or profits actually produced by the assets, they are liable to be charged with the highest rate at which profit might have been made, and, at all events, with interest at current rates. *Ringgold v. Stone*, 20 Ark. 526; 3 Harring. 469; *English v. Harvey*, 2 Rawle, 305. A conversion of productive property into cash, long before it becomes needful for the purposes of the estate, may charge the representative with interest. *Verner's Estate*, 6 Watts, 250. And, if a representative improperly employs funds in trade or speculation, the beneficiaries may elect to take the profits instead of interest. *Wms. Exrs.* 1847; *Rocke v. Hart*, 11 Ves. 61; *Robinett's Appeal*, 36 Penn. St. 174; *supra*, 338.

Upon the executor's or administrator's own debt to the estate, the usual rules of interest apply as to other debtors. *Supra*, 250. Interest may be recovered on legacies, and, perhaps, on debts or claims which are not seasonably paid, and whether the representative shall be reimbursed from the estate depends upon his own conduct as justifying the delay or not. *Supra*, 440, 481.

Where an executor or administrator dies in office, liability for interest may be suspended while the estate is unrepresented. 6 Rich. 83. On improper payments disallowed in his account, one is not readily to be charged with interest. *Clauser's Estate*, 84 Penn. St. 51. As to interest on uncollected claims, see *Strong v. Wilkinson*, 14 Mo. 116. And see 6 Pick. 423. One who has diligently and faithfully discharged his trust of administration is chargeable only for the interest he has made. 11 N. J. L. 145; 6 Dana, 3; 16 S. & R. 416. And for a mere delay in making returns, where the management has been prudent and honorable, interest is not usually imposed. *Binion v. Miller*, 27 Ga. 78. Otherwise, perhaps, if such delay involves the beneficiaries of the estate in great cost and trouble. *Ib.* See also *Davis's Matter*, 62 Mo. 450; *McQueen's Estate*, 44 Cal. 584; 12 S. C. 422; *Armstrong's Estate*, 125 Cal. 603, 58 P. 183; 46 S. E. 589, 54 W. Va. 621; *Wyckoff v. O'Neil*, 71 A. 388, 71 N. J. Eq. 729. Interest actually received must of course be accounted for. *Supra*, 537. See further, 116 N. W. 23, 152 Mich. 218 (charges permitted on either of two accounts).

idle, and negligence is not readily inferred from such conduct, but often the reverse; though needlessly to keep money long in his hands, unproductive, might charge him.<sup>1</sup> Whether the personal representative shall justly be charged with interest on funds belonging to the estate, the particular circumstances in each case must determine.<sup>2</sup>

539. **Real estate, we have seen, may be inventoried under a separate head;** but it is the amount of personal property alone, as returned in the inventory, for which a representative is primarily chargeable in account, since one does not, in that capacity, deal usually with a decedent's real estate, unless an emergency arises.<sup>3</sup> Where, however, real estate has been sold under a license for the payment of debts, or under a power contained in a will, or in some other manner lands or their proceeds come into the hands of the executor or representative, to be managed and dealt with as personal assets, they enter into the usual administration account together with rents and profits subsequently accruing; the representative taking due care to settle the same with those properly entitled thereto.<sup>4</sup> In a few States, moreover, as we have seen, both the real and personal property of a decedent is temporarily managed by his executor or administrator.<sup>5</sup>

<sup>1</sup> *Wms. Exrs.* 1844, and *Perkins's* note; 2 *Cox*, 115; 3 *Bro. C. C.* 73, 108, 433; *Ashburnham v. Thompson*, 13 *Ves.* 401; *Griswold v. Chandler*, 5 *N. H.* 497; *Stearns v. Brown*, 1 *Pick.* 531; 183 *Penn. St.* 647, 39 *A.* 2; *Knight v. Loomis*, 30 *Me.* 204; *Ogilvie v. Ogilvie*, 1 *Bradf.* 356. Pursuance of duty, in accordance with the principles we have discussed, affords a fair test.

<sup>2</sup> American practice does not appear to favor charging the representative with interest upon funds which he is prepared to disburse, and denying him his commissions or compensation besides, unless some wilful default be shown. *Troup v. Rice*, 55 *Miss.* 278; *Lloyd's Estate*, 82 *Penn. St.* 143. Local statutes, however, may supply some local rules on this subject. *Clark v. Knox*, 70 *Ala.* 607, 45 *Am. Rep.* 23.

<sup>3</sup> *Supra*, 213, 509. Nor do rents of land go properly into an administration account, to be blended with items of personal assets; as the outlay or distribution of such funds follows distinct rules. *Supra*, 510; 11 *Phila.* 118. If the heirs or devisees permit the representative to manage real property, his account becomes most naturally a special account with them as their attorney. With regard to expenses of laborers, etc., in getting in crops, see 70 *Ala.* 63; 307. Cf. 106 *N. Y. S.* 471.

<sup>4</sup> See *Boyd, Re*, 4 *Redf.* 154; Part VI, c. 2. Chattels real, leases, etc., of course, if sold or underlet, enter into administration accounts with personal property. *Supra*, 223. See *Gottsberger v. Smith*, 2 *Bradf.* 86. Real estate may well be accounted for under most circumstances, under special schedules; and so with all funds set apart agreeably to law or a testator's directions for special purposes.

<sup>5</sup> *Supra*, 510.

If in the sale or management of the land, under due authority as above, the representative is guilty of culpable negligence or bad faith resulting in loss to the estate, he may be charged with such loss on his accounting. *Haight v. Brisbin*, 100 *N. Y.* 219, 3 *N. E.* 74; *Brown v. Reed*, 56 *Ohio St.* 264. On the other hand he should be allowed for all expenses fairly incurred upon such property in the discharge of his trust. Part VI, *supra*; *Dey v. Codman*, 39 *N. J. Eq.* 258; 87 *N. C.* 34. And see *Sewell v. Slingluff*, 62 *Md.* 592.

540. In adjusting an administration account, the probate court has authority to require that assets not inventoried nor credited by the executor or administrator, shall nevertheless be accounted for.<sup>1</sup> And the validity of a claim against the executor or administrator in favor of the estate, as growing out of his misappropriation or abuse of trust, may thus be established.<sup>2</sup> On the other hand, where the representative has acted apparently in good faith and for the best interests of the estate, and the probate court approved his acts at the time, he deserves protection, whether all his acts were technically legal or not.<sup>3</sup>

541. (2) **As to allowances on accounting.** The opposite schedule of the administration accounts, or schedule B., exhibits amounts paid out in detail, and such sums, by way of charge to the estate and credit to himself, as the representative may claim for allowance. As to the amounts paid out, all proper disbursements made by the executor or administrator with due regard to rules of priority and limitations respecting creditors, in the course of settling the estate, should here be credited; and whether the debt or claim originated with the decedent, or with himself, he is entitled to its allowance and credit, if it be fitly charged against the estate on the general principles of law which apply to administration.<sup>4</sup> Following the general maxims, elsewhere fully discussed, each credit should be allowed according to what was honestly and prudently disbursed. If the representative has paid off claims at a

Final account and confirmation of real estate sale are separate matters for procedure. 119 Ala. 377, 24 So. 245.

<sup>1</sup> 4 Mass. 318; *Hurlburt v. Wheeler*, 40 N. H. 73; *Wills v. Dunn*, 5 Gratt. 384.

<sup>2</sup> *Gardner v. Gardner*, 7 Paige, 112; 1 Barb. 372. And see *Moore v. Holmes*, 32 Conn. 553. One may be charged with omitted assets against his own statements; though the question is, after all, one of evidence. *Downie v. Knowles*, 37 N. J. Eq. 513.

If the executor or administrator, when appointed, is well able to pay a debt which he personally owes the estate, he should be charged with it on his final account, even though by that time he proves insolvent. *Baucus v. Stover*, 89 N. Y. 1; *Condit v. Winslow*, 106 Ind. 142, 5 N. E. 751; 69 Cal. 239, 10 P. 335; 208, *supra*. As for indebtedness of a firm of which he is a member, see 95 N. Y. 340 (code). And see 88 N. C. 407. Pendency of interpleader over a doubtful title suspends accountability. See *Sanderson v. Sanderson*, 20 Fla. 292.

<sup>3</sup> *Owen v. Potter*, 115 Mich. 557, 73 N. W. 977. Release from distributee may be shown. 192 Penn. St. 531, 43 A. 1027. For erroneous charges against himself in account, the representative should be duly credited. 107 Ga. 494, 33 S. E. 669.

<sup>4</sup> *Supra*, 441; *Edelen v. Edelen*, 11 Md. 415. "Expenses of settling the estate" ought to be specified by items, not allowed as a gross sum. 30 Conn. 205. Even though he paid before he was obliged to do so, he is entitled to full credit if the estate suffered no damage by it. *Millard v. Harris*, 119 Ill. 85, 59 Am. Rep. 789, 6 N. E. 469. The expenses incurred in realizing a particular fund, or collecting a particular claim, are properly charged accordingly, so as to present a net result. *Hays's Estate*, 153 Penn. St. 328, 25 A. 822.



discount, the estate shall reap the benefit;<sup>1</sup> while, for what he may have paid out imprudently, or dishonestly, or illegally, full credit cannot be allowed.<sup>2</sup> Claims which have been honestly paid in the exercise of a sound and prudent discretion, where the local practice leaves this fiduciary to settle and adjust with creditors, should be allowed;<sup>3</sup> and it is not enough for their disallowance, that their payment might possibly have been resisted.<sup>4</sup> The same considerations hold true of paying allowances to widow or children, legacies and distributive shares.<sup>5</sup> Where assets realize less on sale or collection, or otherwise prove less valuable than as appraised in the inventory, the loss or depreciation should be stated by way of credit;<sup>6</sup> and if proper, allowance will be made accordingly.<sup>7</sup> Nothing can be allowed one, however, inconsistent with the just fulfilment of his fiduciary obligations; but he is chargeable with all losses resulting from his maladministration.<sup>8</sup>

**542. Disbursements duly credited thus may include expenses of last sickness, the funeral and burial expenses, the outlay for cemetery lot and monument, all of which have been sufficiently dis-**

<sup>1</sup> *Paff v. Kinney*, 1 Bradf. Sur. 1; *supra*, 638; *Carruthers v. Corbin*, 38 Ga. 75; *Chevallier v. Wilson*, 1 Tex. 161. See 8 N. H. 444.

<sup>2</sup> *Supra*, 431.

<sup>3</sup> See *supra*, Part V, c. 1; *Rogers v. Hand*, 39 N. J. Eq. 270 (claim compromised to avoid litigation). Taxes (personal) paid with reasonable prudence are allowable, even though the tax was subsequently declared void. 142 Mo. 187, 43 S. W. 659. And as to inheritance tax, see 103 N. Y. S. 446; 70 A. 579, 221 Penn. 112; *Wyckoff v. O'Neil*, 71 A. 388, 71 N. J. Eq. 729.

<sup>4</sup> *Frazer, Re*, 92 N. Y. 239.

<sup>5</sup> As distribution can only be safely made upon a final surplus, an administration account which credits all advancements to distributees, as they happen to be made, without reference to the respective shares and their amounts, is erroneous in form. 543, *post*; *Pearson v. Darrington*, 32 Ala. 227; *Rittenhouse v. Levering*, 6 W. & S. 190; *Adair v. Brimmer*, 74 N. Y. 539; 527. Disbursements by way of distribution are to be reckoned on a division of the balance, all distributees being treated fairly; and on such a basis, for whatever has been advanced by the representative to parties in interest he may reimburse himself. See Part V, c. 5; *Lyle v. Williams*, 65 Wis. 231, 26 N. W. 448; *Gundry v. Henry*, 65 Wis. 559, 27 N. W. 401; *Kost's Appeal*, 107 Penn. St. 143. What a retiring representative pays over to his successor he should be credited with. See *Allen v. Shriver*, 81 Va. 174.

<sup>6</sup> For, reckoning upon the basis of an inventory value, the accountant debits himself with gain, and credits himself with loss, instead of accounting for gross amounts actually realized.

<sup>7</sup> *Supra*, 362; 40 N. J. Eq. 158; *Knapp v. Jessup*, 109 N. W. 666, 146 Mich. 348, 117 Am. St. Rep. 646, 7 L. R. A. (N. S.) 617. As upon a sale of stock. *Jones, Ex parte*, 4 Cr. C. C. 185; *Jones, Re*, 1 Redf. 263. Or where a debtor, supposed with good reason to be good, turned out insolvent. *Cline's Appeal*, 106 Penn. St. 617. Or in case of a prudent deposit of funds in a bank which afterwards fails. 38 N. J. Eq. 259. See Part IV, cs. 2-5.

<sup>8</sup> As where he pays claims in full regardless of the priority of other claims. 108 Ala. 209, 19 So. 312. Or incurs expense in suing a debt due from himself to the estate. 150 Penn. St. 307, 24 A. 623. Where he fails to keep careful accounts, he is at disadvantage. 54 N. J. Eq. 371, 34 A. 882.

cussed;<sup>1</sup> together with those other preferred claims, commonly styled the charges of administration, as to which last, the representative submits his claim, as for a personal allowance, more directly to the discretion of the court upon accounting.<sup>2</sup> All reasonable charges incurred for the benefit of the estate are to be allowed to a faithful representative; and thus may he be indemnified against loss upon contracts relating to the estate, where he has justly incurred a personal liability.<sup>3</sup> But special costs and expenditures, incurred through the representative's own culpable carelessness, extravagance, or misconduct, he cannot fasten upon the estate.<sup>4</sup> Nor can he claim interest from the estate, for debts paid and advances from his private funds, where he might have met such demands seasonably out of the assets.<sup>5</sup> Nor be credited with payment made for debts unauthorized by law, from a sense of honor and to save family disgrace; for such payments, if honor-

<sup>1</sup> See *supra*, 421, 422. And as to necessities for support of the family, see *supra*, 448.

<sup>2</sup> See *Collins v. Tilton*, 58 Ind. 374; 545, *post*; 4 H. & M. 57; *Pearson v. Darrington*, 32 Ala. 227; *Edelen v. Edelen*, 11 Md. 415; 2 Bradf. 291; *Clarke v. Blount*, 2 Dev Eq. 51; *Wilson, Re*, 2 Penn. St. 325.

<sup>3</sup> *Supra*, 259. Thus, where the executor or administrator pays a debt or discharges an obligation, which constituted a just charge against the estate, out of his private funds, he may claim an allowance for the same in his account. *Woods v. Ridley*, 27 Miss. 119; *Watson v. McClanahan*, 13 Ala. 57; 97 N. Y. S. 171. And though he should have paid prematurely, yet for that which, regarding legal priorities, was justly payable, he may claim remuneration. *Johnson v. Corbett*, 11 Paige, 265. Payments made in good faith, under a *de facto* appointment, may be allowed, notwithstanding a revocation of the appointment afterwards. *Bloomer v. Bloomer*, 2 Bradf. 339; *supra*, 160; *Sewell v. Slingluff*, 62 Md. 592. A sacrifice of assets to meet obligations may often be justified as necessary, or not unreasonably imprudent. *Wingate v. Pool*, 25 Ill. 118. And, where the proper disbursements exceed the receipts, relief may be had from other property belonging to the estate, as from the decedent's lands, if the personal assets prove insufficient. *Reaves v. Garrett*, 34 Ala. 558; *Clayton v. Somers*, 27 N. J. Eq. 230. Usurious payments are unfavorably regarded, and yet they may be allowed in meritorious instances. *Coffee v. Ruffin*, 4 Coldw. 487. See 2 P. & H. (Va.) 124. The expense of keeping a horse which could not be sold may be allowable. 7 J. J. Marsh. 190. And see 327. The charge of interest by a representative, for payments from his own means, is viewed with suspicion; yet interest may be allowed him on sums which he has advanced for necessary outlays to preserve the assets or for debts carrying interest. *Liddell v. McVickar*, 11 N. J. L. 44, 19 Am. Dec. 369; *Mann v. Lawrence*, 3 Bradf. 424.

A novel question relates to his right to charge the estate specially with the cost of procuring sureties on his bond, or more especially for paying a guaranty company. See 51 La. Ann. 490; 25 So. 391; 30 So. 239, 105 La. 592; *Eby's Estate*, 164 Penn. St. 249, 30 A. 124 (not allowed). The rent of a box in a safe-deposit vault may under just circumstances be allowed to the representative. *Dudley v. Sanborn*, 159 Mass. 185, 34 N. E. 181. See (1897) 2 Ch. 190.

<sup>4</sup> *Brackett v. Tillotson*, 4 N. H. 208; *Robbins v. Wolcott*, 27 Conn. 234; *Mackin v. Hobbs*, 105 N. W. 305, 126 Wis. 216; 44 So. 958, 153 Ala. 437. Losses occurring through his negligence in taking a refunding bond from distributees may render the representative liable. 8 B. Mon. 461. Or where he pays without a sufficiency of assets debts to which others should have been preferred. See Part V, c. 1. And see *Evans v. Halleck*, 83 Mo. 376 (subrogation to the rights of a secured creditor mistakenly paid).

<sup>5</sup> *Billingslea v. Henry*, 20 Md. 282.

ably made, are made from one's own means.<sup>1</sup> For whatever losses or impairment of assets may have been occasioned by the representative's want of due diligence or bad faith, by his disobedience to the directions of a will, of a local statute, or of the general law pertaining to the administration of the estate intrusted to him, he is accountable.<sup>2</sup> Nor can one charge the estate for looking up or litigating some interest purely of his own, as an heir or otherwise.<sup>3</sup>

<sup>1</sup> *Jones v. Ward*, 10 Yerg. 160.

<sup>2</sup> Part IV, cs. 2, 5 in detail; *Weldy's Appeal*, 102 Penn. St. 454. Loss of property occurring through the representative's culpable neglect to apply for an order of distribution charged to him. *Sanford v. Thorp*, 45 Conn. 241. Cf. 8 N. H. 444. And damages to distributees by his unreasonable delay. 71 Ala. 163.

<sup>3</sup> *Glynn's Estate* 57 Minn. 21, 58 N. W. 684. And see 163 Penn. St. 35, 29 A. 758. Expenses incidental to a sale of assets, including, if proper, an auctioneer's bill, may be thus charged to an estate. *Pinckard v. Pinckard*, 24 Ala. 250. This does not include usually any refreshments to customers. *Griswold v. Chandler*, 5 N. H. 492. As to purchasing lumber, see 31 Oreg. 86, 49 P. 886; *Willard's Estate*, 73 P. 240, 139 Cal. 501, 64 L. R. A. 554. And in certain sales a broker's services are well employed. *Tucker v. Tucker*, 29 N. J. Eq. 286. Under some circumstances, considering the condition of the estate, the expense of an agent, collector, or bookkeeper, may be charged to a reasonable amount. *Hopk.* 28; *Morrow v. Peyton*, 8 Leigh, 54; *Henderson v. Simmons*, 33 Ala. 291, 70 Am. Dec. 590; 16 La. Ann. 256; 1 Harp. Ch. 224; 121 Cal. 609, 54 P. 97; 16 Abb. Pr. N. s. 457. Cf. *Gwynn v. Dorsey*, 4 Gill & J. 453. In American practice, a special charge for clerical services on small estates is not generally allowed, though special circumstances may justify such charges. 3 Redf. 465; 31 So. 450, 132 Ala. 230; 77 N. E. 1108, 221 Ill. 581; *Merritt v. Merritt*, 57 N. E. 1117, 161 N. Y. 634 (reasonable); *Miles v. Peabody*, 64 Ga. 729. In England, clerk-hire, etc., is more naturally allowed, because the fiduciary can receive no personal compensation. *Perry Trusts*, § 912. Likewise, the cost of publishing citations, and other just expenses attending the probate proceedings. *Reynolds v. Reynolds*, 11 Ala. 1023. Or valuable services rendered in procuring assets, and even the services of a detective or other expert, or of some one employed to procure evidence or serve as a witness, where the service was needful or just. *Lewis, Re*, 35 N. J. Eq. 99; *Greene v. Grimshaw*, 11 Ill. 389. But one cannot charge for specially employing another to do what he should have done for himself, nor to repair his own mischief. 55 S. W. 12, 67 Ark. 340; 105 N. W. 305, 126 Wis. 216; 82 N. Y. S. 394.

Whether the executor or administrator can claim for travelling expenses to and from court, or board and lodging, will depend upon custom and the special circumstances; and all expenses of this nature must have been reasonably and *bona fide* incurred in prosecuting the business of the estate. Disallowed in 3 Hayw. 123. See *Watkins v. Romine*, 106 Ind. 378, 7 N. E. 193; 80 N. Y. S. 214; *Dey v. Codman*, 39 N. J. Eq. 258; 82 P. 577, 14 Wyo. 101; 4 Dem. 536. See also 31 Oreg. 86, 49 P. 886; 122 Cal. 260, 54 P. 957; 147 Mo. 319, 48 S. W. 915. But a relative cannot charge the estate for offices properly gratuitous and kind, even though he be executor or administrator. *Lund v. Lund*, 41 N. H. 355. And see 106 N. Y. S. 471.

An executor or administrator should not charge the estate for services rendered by him during his decedent's lifetime, of apparently a gratuitous character or recompensed by a legacy; nor upon any iniquitous claim. *Egerton v. Egerton*, 17 N. J. Eq. 419; *supra*, 431; 14 N. J. Eq. 514. But for a *bona fide* debt due him by the decedent, he may claim allowance as creditor on the usual footing; all proper offsets being duly reckoned. *Supra*, 439. See further, *Kerr v. Hill*, 2 Desau. 279; *Dickie v. Dickie*, 80 Ala. 37. See also, 208; *Baucus v. Stover*, 89 N. Y. 1 (which reverses s. c. 24 Hun. 109). And see 69 Cal. 239, 10 P. 335; *Condit v. Winslow*, 106 Ind. 142, 5 N. E. 751. Under the New York code the representative is chargeable for the indebtedness of a firm of which he is a member. 95 N. Y. 340. See 88 N. C. 407; *Sanderson v. Sanderson*, 20 Fla. 292; 40 N. J. Eq. 158; Part IV, c. 3; 537.

543. As to allowing special advancements made to distributees, expenses of education and maintenance devolve, usually, upon trustees under a will and guardians, rather than upon the fiduciary who administers and distributes the estate.<sup>1</sup> An administrator cannot in general be credited, in his accounts, for board, clothing, or other necessities of his adult distributees;<sup>2</sup> for such outlay, if matter of allowance at all, affects only the method of paying fully the share of an individual distributee, as if the representative had advanced him so much money. On a settlement of administration accounts, one is not properly credited for money advanced by him to a distributee; but the amount may be charged by him against the distributee when the latter's distributive share is ascertained.<sup>3</sup> But statute allowances to widows and young children stand on their own peculiar footing;<sup>4</sup> and, as to executors, these may have the right and duty of applying sums for education and maintenance, in exceptional instances, under a testator's directions.<sup>5</sup>

544. For asking legal advice, employing counsel, or incurring costs in litigation on behalf of the estate, executors or administrators may claim reasonable allowance for the same in their accounts, such employment being reasonable and proper.<sup>6</sup> It is the duty of a

<sup>1</sup> See *Perry Trusts*, 117, 612; *Schoul. Dom. Rel.* 3d ed. § 238.

<sup>2</sup> *Brewster v. Brewster*, 8 Mass. 131; *Trueman v. Tilden*, 6 N. H. 201; *Willis v. Willis*, 9 Ala. 330; *Sorin v. Olinger*, 12 Ind. 29; 10 Sm. & M. 179; 8 Jones L. 111. Rent of a family pew, occupied by the family after the testator's death, follows this rule. *Scott v. Monell*, 1 Redf. 431. And see *State v. Donegan*, 83 Mo. 374.

<sup>3</sup> 541, *supra*; *Dickie v. Dickie*, 80 Ala. 57; *Fitzgerald's Estate*, 57 Wis. 508, 15 N. W. 794.

<sup>4</sup> *Supra*, 451; *Mead v. Byington*, 10 Vt. 116; 1 Har. & J. 227; *Simmons v. Boyd*, 49 Ga. 285.

<sup>5</sup> *Triggs v. Daniel*, 2 Bibb, 301; *Harris v. Foster*, 6 Ark. 388. Upon equitable principles our probate courts may allow either to executors or administrators sums advanced for an infant legatee's or distributee's education and maintenance; and such jurisdiction, it is held, may be implied even if not expressly conferred. *Hyland v. Baxter*, 98 N. Y. 610. And see *Munden v. Bailey*, 70 Ala. 63. Moneys may be thus expended in good faith and properly for infant legatees or distributees who have no guardian. Executors or administrators may claim. *Rogers v. Traphagen*, 42 N. J. Eq. 421; 39 N. J. Eq. 258; 20 Fla. 262; *Gilfillen's Estate*, 170 Penn. St. 185, 50 Am. St. Rep. 760, 32 A. 585; *Ford v. Ford*, 80 Wis. 565; 6 Houst. 552.

Charges for the maintenance or education of the decedent himself (e.g., a minor) are reckoned like other claims against an estate; and, while the representative's own charge in such connection invites scrutiny, it may, if proper, be allowed him. 11 S. & R. 204; *Wall's Appeal*, 38 Penn. St. 464. And see 4 Redf. 380.

<sup>6</sup> *Wms. Exrs.* 1860; *Macnamara v. Jones*, Dick. 587; 24 W. R. 979. See also, 256; 28 So. 415, 127 Ala. 328; *Porter v. Long*, 83 N. W. 601, 124 Mich. 584; 80 N. E. 1121, 188 N. Y. 542. The fact that the administrator was insane when he paid does not deprive him of such credit. 95 N. C. 265.

Some States, in practice, are opposed to giving credit for attorney's fees paid by the fiduciary to a firm of which he is a member. 93 Ind. 121. But in other States a fiduciary who is also a professional lawyer is entitled to make the usual professional charges, provided his whole recompense be fair and reasonable. 70 Ala. 607, 45 Am. Rep. 93.

representative to defend the estate against claims which he honestly, or upon reasonable grounds, believes to be unjust; and these expenses should be reimbursed, even though the suit be lost;<sup>1</sup> and certainly, if the estate benefit by it. The principles are those discussed elsewhere: good faith and ordinary prudence on his part, in protecting the interests he represents, are all that may be exacted of him;<sup>2</sup> and, in employing counsel, he incurs a personal liability, his lien on the assets serving for his own indemnity.<sup>3</sup> With such reservations, the expenses of a litigation *bona fide* incurred, whether for procuring the probate of a will or one's appointment, or in the due course of administration, as in the pursuit of assets, or in resistance to creditors, or in asking instructions of the court, as also by way of accounting in compliance with the law and the terms of his bond, are allowed, with considerable indulgence, out of the assets, that a faithful representative may not personally suffer.<sup>4</sup> These considerations apply to taxing court costs, or to the fees of attorneys and counsel in or out

<sup>1</sup> *Polhemus v. Middleton*, 37 N. J. Eq. 240; 71 Vt. 160, 44 A. 96; 32 Ala. 227; 6 Greenl. 48; 6 Allen, 494; 19 N. H. 205; 35 Miss. 540; 31 Penn. St. 311; 28 Vt. 765; 4 Redf. 302.

<sup>2</sup> *Supra*, 314.

<sup>3</sup> *Supra*, 256; *McHardy v. McHardy*, 7 Fla. 301; *Parker v. Day*, 155 N. Y. 383, 49 N. E. 1046.

<sup>4</sup> *Wms. Exrs.* 376, 594, 860, 1894; cases *supra*; 33 Ala. 291, 70 Am. Dec. 590; 8 Gill, 285. One may specially limit his liability by a contract that the attorney shall look to the estate alone for payment. 58 Md. 58. The court makes its own allowance, but the contract with counsel depends upon the parties. *Kruger's Estate*, 85 P. 891, 143 Cal. 141.

As to the liability of executors or administrators for costs, upon a non-suit or a verdict against them, see *Wms. Exrs.* 1894, 1897, 1980. Costs in suits asking directions under a will, etc., and in such other amicable litigation as may be justifiable under the particular circumstances, are usually allowed, at the court's discretion, out of the estate. *Wms. Exrs.* 376, 2034, 2038; L. R. 1 P. & D. 655; 1 Paige, 214; 31 N. J. Eq. 234; 159 Mass. 185, 34 N. E. 181. And to such awards probate and equity courts incline in their own formal practice. In probate causes, in some States, however (probate proceedings being conducted somewhat informally), it is not customary to allow costs to either party. 12 Allen, 17; 7 Gray, 472. And see 4 Redf. 1. Local practice usually determines the question of costs, independently of external jurisdictions.

Contingent fees, or fees beyond those taxable, may be consistent with local practice. 2 H. & M. 9; 29 Miss. 72. See *Platt v. Platt*, 105 N. Y. 488, 12 N. E. 22 (fraudulent transfers by decedent litigated). But legal expenses, and the reasonable fees of attorneys or counsel employed in good faith, are thus allowable. 33 Ala. 291, 70 Am. Dec. 591. Each case must stand on its own merits as to allowing the executor or administrator for costs and fees in litigation. 9 Ala. 734; 31 Oreg. 86, 49 P. 886. The representative cannot bind the estate by a promise to convey a portion of the land recovered by suit, as the attorney's contingent fee. 64 Ark. 438, 44 S. W. 848. Allowances of this character are often found regulated by local statute. *Seman v. Whitehead*, 78 N. Y. 306. In some cases the counsel services were not really rendered to the representative himself, but upon the stipulation of the heir or devisee. Costs made by claimants in successfully prosecuting claims against an estate are not expenses of administration. *Taylor v. Wright*, 93 Ind. 121.

of court,<sup>1</sup> and to proceedings on appeal as well as in the original jurisdiction.<sup>2</sup>

545. **As to the compensation of executors and administrators,** the long-established English rule of chancery has been that a fiduciary office is honorary and gratuitous. Hence, the executor or administrator must serve without recompense for his own services, being strictly forbidden to make profit out of his office.<sup>3</sup>

<sup>1</sup> 6 Thomp. & C. 211; 30 Ark. 520.

<sup>2</sup> Hazard v. Engs, 14 R. I. 5.

Bills for legal services, counsel fees, and the costs of litigation, are not to be allowed to the personal representative where the expense was not incurred in good faith, as reasonably calculated to promote the benefit of the estate. *O'Neil v. O'Donnell*, 9 Ala. 734. Nor where, in instituting litigation or suffering it to proceed, or in managing the cause on his own part, the representative was culpably remiss in the performance of the duty confided to him. *Green v. Fagan*, 15 Ala. 335; *Mims v. Mims*, 39 Ala. 716; *Stephens's Appeal*, 56 Penn. St. 409; *Cameron v. Cameron*, 15 Wis. 1, 82 Am. Dec. 652; *Dorris v. Miller*, 105 Iowa, 564, 75 N. W. 482; 141 Mo. 642, 43 S. W. 617; 122 Cal. 260, 54 P. 957; 107 N. C. 278, 12 S. E. 134; 65 Cal. 287, 3 P. 896; *Clement's Appeal*, 49 Conn. 519 (apportionment where only partly for his benefit); *Kingsland v. Scudder*, 36 N. J. Eq. 284; 58 Iowa, 36 (costs upon exceptions to his account); 37 Ala. 683; 109 Mass. 541; 81 Penn. St. 263; 109 Ala. 117, 19 So. 440; *Lilly v. Griffin*, 71 Ga. 535. Nor where the expense was incurred by him, against the interests of the estate, and for his own express benefit, as in needless and selfish antagonism, or in resisting just proceedings against him, or because of his misconduct. Nor for services in connection with matters which lie outside the range of his official duty. *Lusk v. Anderson*, 1 Met. 426; 2 Bibb, 609; 17 Wash. 683, 50 P. 589; 80 Cal. 625, 22 P. 260; 120 N. C. 472, 27 S. E. 121; *Roberts's Estate*, 163 Penn. St. 408, 30 A. 213. Nor where, imprudently or dishonestly, he has incurred needless expenditure in the execution of his trust; employing legal services where none were required, or more counsel than was reasonably needful and proper, or settling extravagant fee bills without a prudent scrutiny. *Crowder v. Shackelford*, 35 Miss. 321; *Liddell v. McVickar*, 11 N. J. L. 44, 19 Am. Dec. 369. And see *Smyley v. Reese*, 53 Ala. 89, 25 Am. Rep. 598; 5 Dem. 244. Nor in general where such services were unnecessary. *Wyckoff v. O'Neil*, 71 A. 388, 71 N. J. Eq. 729; 71 Va. 160, 44 A. 96; 118 Mich. 678, 77 N. W. 263. The general rule is, moreover, that attorney's fees are not to be recovered from an adverse party. *Dorris v. Miller*, 105 Iowa, 564, 75 N. W. 482.

Costs or counsel fees are not usually to be credited on the representative's accounts, unless he has paid them. *Thacher v. Dunham*, 5 Gray, 26; 40 Ala. 391, 421; 106 N. Y. S. 471. As to allowing them directly to the attorney, see 12 W. Va. 427. And where an attorney performs services properly belonging to the representative himself, compensation for both of them cannot reasonably be allowed. 4 Dem. 333. See *Kingsland v. Scudder*, 36 N. J. Eq. 284. All such counsel services are a personal charge to the representative in the first instance according to American practice; and his effort is to have them allowed him on his account. 3 Dem. 1. In various important instances an executor or administrator is called upon to employ legal counsel and may rely upon professional advice as to prosecuting or settling a claim, otherwise performing his proper duties; but he does not thereby forego his own duty of prudence and honor. See 142 Mo. 187, 43 S. W. 659; 274 *supra*; 99 Tenn. 462, 42 S. W. 199; *Pryor v. Davis*, 109 Ala. 117, 19 So. 440.

<sup>3</sup> *Perry Trusts*, §§ 432, 904; *Robinson v. Pett*, 3 P. Wms. 132; *Wms. Exrs.* 1853. A consequence not unnatural is, that the labors of the office with its responsibilities become shifted unduly, where the estate is a large and onerous one, upon solicitors, proctors, counsel, and officers of the court; so that the actual representative finds himself administering, not unfrequently, for the peculiar profit of those whom he must trust to lead him, unless he can keep such business out of the courts as non-contentious. But it has been found necessary to allow compensation in British colonies in order to induce suitable men to accept the office; and probably with the modern develop-

American policy, on the other hand, binds the executor or administrator closely to the court in his official dealings; but renders the judicial proceedings as inexpensive as possible, and remunerates him for faithful services; holding him bound, in consequence, to fulfil his trust with a just sense of the legal obligations which it imposes. It discourages the idea of recompensing deputies liberally for duties which the representative may himself capably render. And, compensation being thus allowed, the legal liability is greater; and more stress is laid upon personal qualifications for the trust.<sup>1</sup> Such then, being the rule in, perhaps, every State in this Union, it becomes matter of local custom or enactment what compensation shall be reasonable. In many States, a commission on the amounts received and paid out is allowed; an excellent basis for such a computation, and, perhaps, universally approved as such in this country, wherever a fiduciary's recompense is passed upon.<sup>2</sup> But as such a rule meets routine rather than

ment of wealth invested in personal securities, other exceptions will be conceded by the English Parliament. See as to trustees, *Perry Trusts*, § 904; and as to guardians, *Schoul. Dom. Rel.* § 375.

<sup>1</sup> "The policy of the law ought to be such as to induce honorable men, without a sacrifice of their private interests, to accept the office." 2 Story Eq. Jur. § 1268 n. And see *Boyd v. Hawkins*, 2 Dev. Eq. 334; *Perry Trusts*, § 917. But cf. Chancellor Kent in 1 Johns Ch. 37, 7 Am. Dec. 475, 534. Also the Delaware rule as applied in *State v. Platt*, 4 Harring. 154. American policy is in favor of granting remuneration. *Perry Trusts*, § 917; *Schoul. Dom. Rel.* § 375; *Barney v. Saunders*, 16 How. (U. S.) 542, 14 L. Ed. 1047; *Clark v. Platt*, 30 Conn. 282; *Wms. Exrs.* 1853, Perkins's note. And it may also be said that while executors are selected by a decedent as matter of personal trust or confidence to administer, an administrator is appointed to perform duties without any such essential relation to the estate represented.

<sup>2</sup> The allowances made for the compensation of executors and other fiduciary officers varies in different States; but the local statutes on the subject are digested in *Perry Trusts*, § 918, and notes. In the larger number of States the compensation is by way of a commission, which may vary, according to circumstances, from one to ten per cent, which last is usually the maximum. The New York rule established is five per cent on sums not exceeding one thousand dollars; half that amount upon all sums between that and five thousand dollars; and one per cent on sums exceeding that amount. 3 Johns Ch. 43. This rule practically obtains in other States as fixing on the whole a fair average rate. One-half the commission is for sums received, and the other half for sums disbursed. But some statutes fix a higher rate and something depends upon the difficulties of settlement surmounted. 39 N. J. Eq. 270; 189 Penn. St. 385, 42 A. 28; 37 N. J. Eq. 578. And see 28 La. Ann. 638; 11 Phila. (Pa.) 26, 39, 92; 2 Redf. 244, 255, 312, 465. Cf. 18 R. I. 120, 25 A. 1099. Commissions on credits or a set-off, where a claim is adjusted, are not favored; that should rather be computed on the balance; and commissions on a debt owing by or to the representative himself should be disallowed. 85 Penn. St. 398; 38 Tex. 109; 156 Penn. St. 473; *Handy v. Collins*, 60 Md. 229 (debt forgiven by will).

Double and contemporaneous commissions on a constructive change of capacity are treated with disfavor. *Johnson v. Lawrence*, 95 N. Y. 154; 48 S. E. 932, 121 Ga. 285; *Thom v. Thom*, 95 Va. 413, 28 S. E. 583. But executors taking a fund as trustees are entitled to commissions in each consecutive capacity. 39 N. J. Eq. 493; 42 N. J. Eq. 361; *Willets, Re*, 112 N. Y. 289, 19 N. E. 690. It should clearly appear where one capacity ceases and the other begins. *McAlpine, Re*, 126 N. Y. 235, 27 N. E. 475. The executor or administrator may claim commissions, even though the property received remains

extraordinary services, our later cases appear inclined to allow to an executor or administrator, besides the usual commission, a moderate charge for professional and personal services specially rendered by him, where peculiar skill was needed and bestowed, and where he was capable of bestowing it; and such is the positive rule of some States.<sup>1</sup> Commissions and compensation may be

in his hands in the same state as when he received it. 3 Dem. 289. Full commissions in good money cannot be charged upon collections made in depreciated currency. 75 Ala. 162. As to fixing the statute rate of compensation on income, see 2 Dem. 257. An executor cannot usually claim compensation or commissions for turning over specific bequests to the persons entitled to them. 1 Dem. 290; 75 N. Y. S. 490. Nor can commissions be claimed on trust funds of decedent. 169 Ill. 93, 48 N. E. 218. Nor on the principal items of a large transaction of the decedent, which the representative closes out by merely receiving a balance. *Hitchcock v. Mosher*, 106 Mo. 578, 17 S. W. 638. For commissio are properly computed upon what one administers; not upon the gross personalty as the decedent owned it. *Ib.* Cf. 145 Penn. St. 459, 22 A. 962. Where the distributees take the securities left, commissions are allowed as for a sale. 111 N. Y. S. 40.

<sup>1</sup> Each local rule is based largely upon local statutes. Such services are sometimes estimated by the court in fixing the commission; but in most New England States where the court is empowered to allow what is reasonable, specific sums may be charged for special services in addition to the usual commission, or in lieu thereof, provided the whole does not exceed a fair rate of compensation; and the court may vary the allowance according to circumstances. 544, *supra*; *Wendell v. Wendell*, 19 N. H. 210; 11 Phila. 95. In New Hampshire, Maine, and Vermont, the court gives a *per diem* compensation for time, travel, labor, etc.; *Perry Trusts*, § 918. Where an executor gave much time to managing and carrying on farms belonging to the estate, he was allowed a reasonable compensation for this service, besides the usual commissions as executor 70 Vt. 458, 41 A. 508; *Lent v. Howard*, 89 N. Y. 169. Cf. 109 N. W. 666, 146 Mich. 368. And see for extra allowance under peculiar circumstances of difficulty and responsibility, 113 Mich. 561, 71 N. W. 1085. Such allowance is usually discretionary with the court. *Ib.*; *Giger v. Bishop*, 83 N. E. 289, 231 Ill. 472; 69 A. 848 (R. I. 1908); 60 A. 989, 211 Penn. 343; 90 Wis. 236, 63 N. W. 162. In order to recover for extraordinary services, it must appear that they were necessary, and that the usual compensation is insufficient. 93 Iowa, 303, 61 N. W. 975. For uncollectible debts, specific compensation, not a commission, should be the recompense. 40 W. Va. 161, 20 S. E. 933. See further, 98 Mich. 319, 57 N. W. 171; *Hodgman, Re*, 140 N. Y. 421, 35 N. E. 660; *Longley v. Hall*, 11 Pick. 120; *Emerson, Appellant*, 32 Me. 159; *Roach v. Jelks*, 40 Miss. 754; *Evarts v. Nason*, 11 Vt. 122; *Clark v. Platt*, 30 Conn. 282.

A gross sum should not be charged generally for services, without some specification of particulars. 41 Ala. 267. But a gross sum is permitted to be charged in some States. For carrying on decedent's business under a will, a reasonable compensation is allowable, but not commissions computed upon the business receipts and disbursements. *Lamar v. Lamar*, 45 S. E. 498, 118 Ga. 684. Charging more than the statutory remuneration, for services to heirs, etc., is not permitted. 59 Mo. 585; 6 Rich. Eq. 2. Each heir specially served should pay his own recompense. See *Morrison's Estate*, 46 A. 257, 196 Penn. St. 80. As to the Illinois rule, which treats claims for professional service with disfavor, see *Hough v. Harvey*, 71 Ill. 72. A statute rule is peremptory, and the court cannot alter it. 93 P. 121, 6 Cal. App. 730.

Real estate may be sometimes controlled by the representative and a commission allowed. *Eshleman's Appeal*, 74 Penn. St. 42; 70 Ala. 575; 70 Cal. 69, 11 P. 471; 118 Cal. 462, 50 P. 701. For the rule of commissions, where an incumbrance is discharged and applied to a claim, see 36 Tex. 116; 30 Ark. 520; 42 Ohio St. 53. And see, as to selling lands under a power, 24 Hun, 109; *Twaddell's Appeal*, 81\* Penn. St. 221; 38 N. J. Eq. 405. On a sale of real estate, a commission exceeding two and one-half per cent is rarely allowable. 11 Phila. 53. Commissions based on a constructive pos-



forfeited by the representative's misconduct and culpable remissness in his trust.<sup>1</sup> And, if one, moreover, has been appointed on a distinct understanding with those interested to serve as executor or administrator without recompense, or at a stated compensation, he must abide by his engagement.<sup>2</sup> But as a general rule, an honest and prudent fiduciary is entitled to his just recompense,<sup>3</sup> and while one remains honest and prudent he may be allowed recompense, even though his subsequent maladministration should debar all claim for continuing such allowance.<sup>4</sup>

session of assets, and not actual, are not favored. 51 Miss. 211; 30 Ark. 520. And thus is it as to merely constructive dealings with the decedent's real estate. 43 W. Va. 296, 27 S. E. 319. Or with no such dealings at all. 17 Wash. 675, 50 P. 587.

As to an administrator *de bonis non* and his commissions, see Myrick Prob. 163. Special administrators are not usually entitled to full commissions. 41 Ala. 267; 67 Mo. 415. But cf. 106 N. Y. S. 1073. Co-executors or co-administrators are, as a rule, entitled to share the commissions equally. 4 Abb. App. Dec. 578; 40 N. J. Eq. 517; Squier v. Squier, 30 N. J. Eq. 627. But they may arrange with one another as to duties and compensation. See 4 Md. Ch. 368; 8 Md. 548; 545, note. And a survivor of co-representatives may be favored, who has done all the work. 87 Md. 43, 39 A. 102. And so otherwise the *quantum* and value of each one's services may be considered and the court may apportion. 4 Dem. 463; 88 Mich. 614, 26 Am. St. Rep. 306, 50 N. W. 654. A public administrator who seeks an appointment, knowing that by law he is not entitled, can claim no recompense. 27 La. Ann. 574.

As to executors who are testamentary trustees, and their commissions, see 4 Redf. 34; 11 Phila. 80.

Concerning the time when commissions should be computed, see Drake v. Drake, 82 N. C. 443. One should not appropriate his commissions until they have been allowed; but he may retain funds to meet them. Wheelwright v. Wheelwright, 2 Redf. 501. See further, Harrison v. Perea, 168 U. S. 311, 42 L. Ed. 478. Claims for special allowances should, however, always be closely scrutinized, as the representative here employs himself, so to speak; all items improper should be disallowed, and exorbitant amounts reduced.

<sup>1</sup> 67 A. 954, 219 Penn. 46; Brown v. McCall, 3 Hill, 335, 38 Am. Dec. 639; Hapgood v. Jennison, 2 Vt. 294; 3 Green, 51; Clauser's Estate, 84 Penn. St. 51; Eppinger v. Canepa, 20 Fla. 262; 36 La. Ann. 420. Neglect to render accounts until citation does not necessarily forfeit commissions, though it is an unfavorable circumstance. Barcalow, *Re*, 29 N. J. Eq. 282. See 10 S. C. 208; 4 Redf. 34; 94 N. C. 720. One may forfeit commissions, and yet be entitled to a reasonable recompense. 3 Green, 51. One may be entitled to commissions or compensation and yet have to pay interest or be surcharged for some improper outlay. 166 Penn. St. 121, 24 A. 502; 538, *supra*; 41 N. J. Eq. 47, 2 A. 926. See further, 42 N. J. Eq. 337; Stevens v. Melcher, 152 N. Y. 551, 46 N. E. 965. As to the effect of a statutory change in the rule, see 64 Md. 517, 2 A. 913.

<sup>2</sup> Davis, *Re*, 65 Cal. 309, 4 P. 22; 68 A. 763 (N. J. 1907); Hilton v. Hilton, 109 S. W. 905; 33 Ky. Law, 276 (expenses only allowed). It is immaterial that such promise was not made with all parties interested. Bate v. Bate, 11 Bush, 639. But the agreement of one executor to waive commissions cannot prejudice the right of his co-executor. 14 Phila. 290; 401. See 146 Mo. 436, 46 L. R. A. 232, 48 S. W. 653. Making no charge is not *per se* a waiver. 87 P. 241, 4 Cal. App. 43. Any agreement with the heirs for an extra compensation is subject to the court's discretion as to allowing it. 107 N. Y. S. 277.

<sup>3</sup> Pryor v. Davis, 109 Ala. 117, 19 So. 440; 166 Penn. St. 121, 45 Am. St. Rep. 356, 30 A. 1030.

<sup>4</sup> Foster v. Stone, 67 Vt. 336, 31 A. 841.

For illegal allowances voluntarily made, the executor or administrator is responsible to the estate. As where he allows to his intestate's surviving partner for personal services in the business. Loomis v. Armstrong, 49 Mich. 521, 14 N. W. 505.

546. A few points may be added as to charges and allowances on an accounting. An administration account, rendered in the probate court for settlement, is said to be in the nature of a declaration in a writ; so that, unless amended by order of court, a greater sum than actually charged cannot be allowed to the representative, either in that court or upon appeal.<sup>1</sup> But, as to commissions and recompense, the probate practice, in some States, is to omit such items when the accounts are presented, so as to allow them to be entered, or the amounts carried out, upon the hearing before the judge of probate.<sup>2</sup> A bequest to an executor may be made in full of compensation for his trust;<sup>3</sup> but unless the language of the will shows that the bequest is to be by way of specific compensation, this does not deprive him of the right to charge commissions.<sup>4</sup> Nor does the fact that an administrator is also a distributee compel him to treat his distributive share as his recompense for ordinary services. American practice in these days does not favor the deprivation of an executor's fair rights by any restriction which the will itself may contain, even though this executor should probate the will. And where there has been full and just administration, even the court has no power to deprive a fiduciary who settles the estate of the minimum compensation which the law gives him.<sup>5</sup> Where, however, an executor accepts his office with deliberate knowledge that the will has fixed a specific recompense for such services not mean or meagre, he is usually to be held bound thereby.<sup>6</sup>

547. A foreign executor or administrator cannot be compelled to account, unless he has brought assets into the domestic jurisdiction; nor then, necessarily, as one answerable to the local probate court and not rather in chancery, on general maxims.<sup>7</sup> The

<sup>1</sup> *Pettingill v. Pettingill*, 64 Me. 350.

<sup>2</sup> *Lund v. Lund*, 41 N. H. 355, 364; 113 Mich. 561, 71 N. W. 1085. In making up a final account, items for subsequent expenditure or receipt may be specified by way of anticipating payment, under proper circumstances, and the balance struck accordingly. See *Hone v. Lockman*, 4 Redf. 61. And it may be just and proper to defer the complete recompense until the complete performance of one's duties, so that only partial recompense shall be allowed at intermediate periods. See 49 N. J. Eq. 549. The right to retain commission or compensation does not properly accrue until the account has been submitted and allowed. 4 Dem. 463; 542, *supra*.

<sup>3</sup> See provision of such a will in 38 N. J. Eq. 405.

<sup>4</sup> *Mason, Re*, 98 N. Y. 527. See *Runyon's Estate*, 125 Cal. 195, 57 P. 783; *Ireland v. Corso*, 67 N. Y. 343 (commissions specified in will).

<sup>5</sup> *Handy v. Collins*, 60 Md. 229. Our local statutes sometimes permit executors to elect between the commissions fixed by law and any testamentary provision in lieu thereof. 1 Dem. 244, 337.

<sup>6</sup> *Hays's Estate*, 183 Penn. St. 296, 38 A. 622; 98 N. Y. 527.

<sup>7</sup> *Kohler v. Knapp*, 1 Bradf. (N. Y.) 241; *supra*, 173-180.

expenses attending a sale of lands in a foreign jurisdiction, or the taxes paid on such real estate, are not properly allowed upon an administration account rendered in the domestic forum.<sup>1</sup>

<sup>1</sup> 1 Root, 182; *Roberts v. Roberts*, 28 Miss. 152, 61 Am. Dec. 542; *Jennison v. Hapgood*, 10 Pick. 77

Where letters testamentary upon the estate of a resident of some other State are granted in that State to a citizen of Pennsylvania, the Pennsylvania courts have refused to take any jurisdiction to compel the settlement of his accounts or to entertain a bill in equity to charge him with assets, before his accounts have been settled in such other State showing a balance in his hands. *Musselman's Appeal*, 101 Penn. St. 165

## APPENDIX.

## REMEDIES BY AND AGAINST EXECUTORS AND ADMINISTRATORS.

In the course of the present book we have touched upon all the usual remedies to be pursued by or against executors and administrators. As the reader has doubtless observed, English practice favors bringing all the assets of the estate, together with the personal representative, into the court of chancery; there to have the administration practically controlled and directed, unless the parties interested are satisfied that their rights will be duly respected by a settlement out of court;<sup>1</sup> while, according to the American system, chancery is seldom resorted to where the local probate jurisdiction is adequate, and the security chiefly relied upon by creditors, legatees, and other interested parties, is the probate bond, filed by the personal representative, which obliges him not only to administer properly, but to render regular accounts in the probate court besides.<sup>2</sup> It is the bill in equity upon which those interested in the estate who distrust the personal representative, or seek redress against his mismanagement, must chiefly rely, where an English estate is administered; but where the estate is American, a probate court affords chief protection, requiring, as it may, ample sureties to be furnished when such precautions appear desirable, and, in all cases of official delinquency, permitting the representative's bond to be prosecuted for the benefit of the interested parties.<sup>3</sup> As to remedies of this nature, little need be added, except to refer the practitioner to general rules of practice, as laid down in all elementary works of equity or common law, with a further express reference to the codes of his own State, for copious details in which, as independent local courts expound such legislation, American jurisdictions by no means harmonize.

But, in both English and American practice, it frequently occurs that the personal representative should sue or be sued in a common law court; and upon this topic there remains something to be said. Here, as already suggested to the reader more than once, the fundamental difficulty in our practice is, that in some instances the representative should sue or be sued in his official capacity, in others in his personal capacity; while, in an intermediate class of cases, there appears an option given for a suit in either capacity.<sup>4</sup> The essential reason for this distinction is, that our law of administration regards the contract of an executor or administrator as binding himself individually, unless made under an express reservation that only assets shall be resorted to; the real object being to allow assets to be strictly applied to claims in a regular course of administration, so that the personal representative may not create liens or preferences in favor of those with whom he deals. However commendable this rule, its application makes much difficulty in the courts; for an action, grounded in a good cause, may be thrown out because of some misconception in the plaintiff's mind as to how that cause originated, and in what capacity the representative should be made

<sup>1</sup> *Supra*, 518, 521.

<sup>2</sup> *Supra*, 520, 522.

<sup>3</sup> *Supra*, 136, 139.

<sup>4</sup> *Supra*, 137, 140.

a party to the suit.<sup>1</sup> Let us trace the distinction into remedies by or against the personal representative.

(1) As to suits by the executor or administrator. Here the difficulty is the less, because of a liberal option which our law concedes. Where the cause of action originated in the time of the deceased, the representative sues in the *desinet* only, or in his representative capacity. But where the cause accrues after the death of the testator or intestate, the executor or administrator may sue as such or not at his option; and, whenever the fruits of the suit must be assets, he may sue in his representative character, though the cause originated in his own contract.<sup>2</sup> Even though he call himself "executor" or "administrator" in the action, if it appears that the cause of action is in his own right, the representative word may be stricken out as surplusage;<sup>3</sup> and even matters of substance are aided after default or a verdict in his favor.<sup>4</sup>

(2) As to suits against the executor or administrator. It is here that the rigor of the common-law rule is more strongly manifested. Where a defendant is simply misdescribed as "executor" or "administrator," the descriptive word may be stricken out as surplusage, and a judgment rendered against him individually. But where he is sued as executor or administrator, and the whole pleadings show that conception of his liability, when he should have been sued as an individual, the variance is held fatal to the suit.<sup>5</sup> For the judgment follows the complaint; and if the cause is maintained successfully against one in his representative character, the debt, damages, and costs are to be levied *de bonis decedentis*.<sup>6</sup> The action cannot, strictly speaking, be converted into one against the defendant personally, if wrongly begun; nor can counts be joined as of causes originating against the deceased and against the representative; but, for a suit on the representative's own contract, the judgment is against him as an individual, or *de bonis propriis*.<sup>7</sup> The practice in some States appears to change this rule, however, so as to give greater freedom in suing in the alternative, and adapting the judgment accordingly;<sup>8</sup> and such modifications of the old doctrine appear highly desirable in the interests of justice.

We may add a few words as to common-law suits against the executor or administrator. When sued in his representative character, the defendant who intends to deny his being such should specially plead *ne unques executor* or *ne unques administrator*.<sup>9</sup> But the proper plea, where he has not assets as representative, is *plene administravit*.<sup>10</sup> These pleas are sometimes artificially employed,<sup>11</sup> but they are not necessarily false pleas. And, as observed in a leading American case, unless the executor or administrator falsely pleads *plene administravit*, he is not liable to a judgment beyond assets in his hands to be administered.<sup>12</sup> A full and lawful administration previous to such suit, or the utter want of assets to respond to the demand, is a good defence; and

<sup>1</sup> *Supra*, 396.

<sup>2</sup> Wms. Exrs. 1871; *supra*, 290.

<sup>3</sup> Wms. Exrs. 1872.

<sup>4</sup> *Ib.*

<sup>5</sup> See *Austin v. Munro*, 47 N. Y. 360, opinion of court; 5 East, 150. And see 59 Kan. 568, 53 P. 864.

<sup>6</sup> 47 N. Y. 360; *Smith v. Chapman*, 93 U. S. 41, 23 L. Ed. 796; Wms. Exrs. 1937.

<sup>7</sup> See Wms. Exrs. 1937-1939.

<sup>8</sup> Wms. Exrs. 1937, *Perkins's n.*; *Davis v. Vansands*, 45 Conn. 600. But cf. 47 N. Y. 360.

<sup>9</sup> Wms. Exrs. 1943.

<sup>10</sup> Wms. Exrs. 1953. If he has assets, but not enough, he pleads *plene administravit praeter*, etc.

<sup>11</sup> *Supra*, 187.

<sup>12</sup> *Smith v. Chapman*, 93 U. S. 41, 23 L. Ed. 795.

judgment *de bonis decedentis* is the only kind to which the plaintiff would be thus entitled. But, *devastavit* being averred and proved on the representative's part, or assets being shown to have existed which ought to be applied to the plaintiff's claim and which cannot be found, the court may order the judgment levied out of the representative's own proper goods.<sup>1</sup>

<sup>1</sup> *Ib.*; Wms. Exrs. 1975, 1987. When an executor or administrator has committed a *devastavit*, there are two modes of proceeding to render him liable; the one by an action of debt on the judgment obtained against him, and the other by a *scire facias* founded thereon. 3 Head, 575; Wms. Exrs. 1984, 1987.

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NOTE. — In the foregoing table, the Roman numeral letters express the degrees of consanguinity by the civil law, and the Arabic figures at the bottom, those by the common or English canon law. See text, 101.

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